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At B. H. Parliament. House of Lords
REPORTS OF CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON

APPEAL FROM SCOTLAND,

FROM 1726 TO MAY 1757.

BY

**JOHN CRAIGIE, JOHN SHAW STEWART, AND
THOMAS S. PATON, ESQS., ADVOCATES.**

EDINBURGH:

T. & T. CLARK, 38 GEORGE STREET.

LONDON: BENNING AND CO.

MDCCCLXIX.

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REPORTS OF CASES
DECIDED IN
THE HOUSE OF LORDS,
UPON
APPEAL FROM SCOTLAND,
FROM 1753 TO 1813.

BY
THOMAS S. PATON,
ADVOCATE.

BEING THE CONTINUATION OF THE
REPORTS OF MESSRS CRAIGIE AND STEWART.

EDINBURGH:
T. & T. CLARK, 38 GEORGE STREET.
LONDON: BENNING AND CO.

MDCCLXIX.

JUL 15 1901
HOUSE OF LORDS.

LORD CHANCELLOR HARDWICKE, till 6th November 1756.

succeeded by the

EARL OF NORTHINGTON.

SIR DUDLEY RYDER, Attorney-General.

(afterwards Chief Justice.)

HONOURABLE WM. MURRAY, Solicitor-General.

appointed Attorney-General in April 1754,

and afterwards Lord Mansfield.

succeeded by

SIR RICHARD LLOYD, Solicitor-General,

(on promotion by)

HONOURABLE CHARLES YORKE, Solicitor-General.

COURT OF SESSION.

LORD PRESIDENT ROBERT DUNDAS of Arniston.

succeeded in 1754 by

LORD PRESIDENT CRAIGIE.

LORD JUSTICE-CLERK ERSKINE.

LORD ADVOCATE W. GRANT till 1754.

succeeded in 1754 by

LORD ADVOCATE R. DUNDAS.

SOLICITOR-GENERAL ALEXANDER HOME, Esq.

succeeded in 1755 by

ANDREW PRINGLE, Esq., of Alimore.

ADVERTISEMENT.

HAVING prepared for publication a complete body of Scotch Appeals to the House of Lords from 1753 to 1813, a few words are due in explanation.

Prior to 1813, and for the period specified, there are no regular Reports of Scotch Appeals. The ground in this department was first broken by Mr Robertson of London, who brought his work down from the Union to 1727. This was continued by the Reports of Messrs Craigie and Stewart of the Scottish bar, who brought the cases down to 1753. The task has again been resumed with the view of continuing and connecting these with the more modern Reports of Dow, Shaw, and M'Lean. It is intended that the continuation shall embrace, 1st, Many decisions unreported in the Court of Session, and appealed to the House of Lords. 2^d, All cases appealed involving questions of law, and others deemed of importance. It will be published in parts, the cases being arranged according to their dates.

In prosecuting this labour, the Compiler has assumed the utility and importance of these Reports to the legal profession. Perhaps he may be allowed to do so from the results which the examination of the Appeal Cases has disclosed. Many important points understood to be settled law by the latest authorities in Scotland, have, on appeal, been determined otherwise in the House of Lords. Hence the importance of these Reports to the law itself.

The Compiler felt disposed in regard to many cases to omit them altogether, seeing that they were already noticed in Morrison; but as this would have impaired the original design of having a complete body of appealed cases, and as what appears in Morrison does not always throw light on the precise points appealed, nor the ground taken, or argument pleaded before the

House of Lords, he preferred adhering to the plan first laid down, which was that adopted by Messrs Craigie and Stewart.

He regrets not having been able, after much inquiry, to recover more of the speeches of the Lord Chancellors at delivering judgment in cases of older date. These have either not been preserved, or from time or accident are now inaccessible. Yet, while regretting the loss of so much legal learning that might have placed these reports on a more satisfactory basis, it is necessary to discriminate. Until comparatively a recent date, there were no speeches delivered in cases of *affirmance*: So that it is only with reference to cases of reversal of older date, that expectations have been disappointed, and investigation has not been attended with the desired success. At same time, every effort has been made to ascertain the grounds of such decisions; and, for a period of twenty years the Reports will be complete in this respect, accompanied with the speeches of the Lord Chancellors.

Such are the results and the plan of the present undertaking. Of its accuracy and execution, the legal profession are the judges. To them it is respectfully submitted, in the hope, that if deemed worthy reception, it may have their favourable judgment and support. If not, it must cease and determine. The Compiler attaches no merit to the performance. He expects neither consideration nor praise. His only prompting motive has been a desire to be useful in his profession; and if he is adjudged to any extent successful, it will compensate for the labour, and assure him that he has not ventured on a task disproportionate to the utility of the object, or unimportant to the civil jurisprudence of the country.

To Mr Robertson of London, the Compiler of the earliest volume of Appeal Cases, and the author of an invaluable treatise on Personal Succession, the profession are especially indebted for the kind and liberal manner in which he has placed in the Compiler's hands a valuable collection of speeches taken at delivering judgment in the House of Lords, and he has now to return him his grateful acknowledgments.

EDINBURGH, 62 CASTLE STREET,
December 1849.

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REPORTS

OF

CASES ON APPEAL FROM SCOTLAND.

<p>GABRIEL NAPIER, Writer in Edinburgh, - - - - -</p> <p>PETER NAPIER of Napierstoun, and MARGARET YOUNG, his Spouse, - - - - -</p>	<p style="font-size: 3em;">}</p>	<p><i>Appellant;</i></p> <p><i>Respondents.</i></p>
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1726.
 NAPIER
 v.
 NAPIER.

*29th April, 1726.**

BANKRUPT.—*Act 1621, c. 18.*—A debt having been made over by a person, in favour of his wife, *stante matrimonio*, and by her assigned to a second husband, as part of her tocher; the assignation was found not reducible at the instance of a creditor of the first husband.

Costs—L. 80, given to respondents.

JOHN LIDDELL executed a conveyance of his lands of Craigannet, to himself in liferent, and to Francis Napier (father of the appellant), and his heirs in fee, with a clause of absolute warrandice. The deed recites, as the consideration for granting it,

No. 1.
Nov. 16, 1693.

* This date is within the period embraced by Mr. Robertson's Reports. The case is one of those in which Mr. R. was unable to procure the printed papers.

- 1726.**
NAPIER
v.
NAPIER. that Napier had paid certain sums of money, and performed many good services to the granter; and it contains a proviso that his issue male might redeem the same, on payment of the sums so advanced, and failing his issue male, that he might burden it to the amount of [*blank*], for provisions to his daughters. Napier was infest thereon, but his infestment was not recorded till January 1694.
- Dec. 1693.** Shortly after granting the above deed, Liddell married Margaret Young (the respondent), and by the marriage articles, in consideration of 1000 merks to be paid by her father, the half of the said lands of Craigannet were settled upon her for jointure. She was infest, and her sasine duly recorded.
- Dec. 20, 1693.** Thereafter, Liddell assigned to her the 1000 merks due by her father. By another deed, reciting that she was to defray his sick-bed and funeral expenses, he conveyed to her a bond for 600 merks; and, lastly, he executed in her favour a general assignment of half his moveables.
- Dec. 27, —**
- May 1699.** He died, and Margaret having entered into possession of the half of the lands of Craigannet, was married to Peter Napier (respondent), and by her marriage articles, conveyed to him her whole effects, real and personal; and, upon her father obliging himself to pay to him 2000 merks in name of portion, she, with her husband's concurrence, granted to him a discharge of the 1000 merks previously due by him.
- Nov. 1721.** Gabriel Napier (the appellant) raised an action in order to set aside these several assignments under the act 1621, in regard they were granted in

defraud of his claim of damages, under the clause of warrandice in his father's disposition, which was prior in date.

1726.

NAPIER

v.

NAPIER.

The conveyance of one-half of the moveables was reduced, in respect it had not been granted for any onerous cause. That of the 600 merks bond was sustained, in respect it was granted for the funeral expenses, &c.

Dec. 23, 1721.

July 13, 1722.

The appellant further insisted for repayment of the 1000 merks (assigned by Liddell to Margaret, and by her to her present husband, and paid to him), on the ground that the assignation was reducible, under the act; and likewise that it was a deed by a husband to his wife, *stante matrimonio*, and therefore to be presumed gratuitous and revocable. The Lords by various interlocutors found, "that Peter Napier, the husband, having received payment of the sum of 1000 merks for an onerous cause, viz. in satisfaction of a part of his wife's tocher, was not liable to repeat;" and they likewise found "Margaret Young not liable to repeat the 1000 merks received by her husband."

The appeal was brought from "several interlocutors of the Lords of Session in Scotland, of the 10th and 20th November 1722; the 25th and 28th June; the 20th November; and 13th December 1723; and of the 11th July 1724."

Entered
Jan. 28, 1726.

Pleaded for the Appellant:—The appellant was a lawful creditor to Liddell, by the warrandice contained in the disposition, in as far as the half of the lands had been possessed by his widow since his death.

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By the act 1621, a gratuitous assignment is reducible, at the instance of any anterior creditor; and by the constant interpretation of that statute, a conveyance in favour of a conjunct person, more especially a wife, is presumed gratuitous, and such conjunct person obliged to prove a valuable consideration; which in this case has not been done.

The appellant's disposition was not gratuitous, as is proved by the recital of the deed itself. But even assuming that it had been gratuitous, this could not import a faculty to make any provision for a wife out of the lands disposed, the personal estate being sufficient for that end. Moreover, the appellant does not dispute the jointure provided for the wife; but still there is no doubt, that were Liddell himself alive, or had an heir, the disponee, in right of that clause of warrandice, would be a creditor against them to the extent of that incumbrance. Had this jointure existed at the time of Napier's disposition, Liddell might have granted warrandice against it in the way that he has done; and although such warrandice could not create a power to impeach the jointure, it would certainly give a claim of damages against his other effects.

Margaret is liable to repeat the 1000 merks, because the assignment from her first husband to her was null and reducible under the act 1621. By her father's granting his obligation to her present husband and paying it up, the case was the same in law, as if at the date of the marriage articles she had received the money from her father, and delivered it to her husband, who had lent it back to her father upon his bond; seeing that upon her

discharging her father, he became bound to her husband, who accepted of his obligation in satisfaction *pro tanto* of her portion.

At all events, Margaret is liable in repetition of the sum after the dissolution of her present marriage in case of her surviving, as she cannot pretend that she received it for any valuable consideration, but only *donatione inter virum et uxorem*, which of all donations is the most easily reducible.

Peter Napier, the husband, is liable for the 1000 merks, because a purchaser from a conjunct person, who has received a right from a bankrupt, is by law in the same condition with the conjunct person, whether he purchased for a valuable consideration or not. And the argument is stronger in the present case, where the right made to Margaret Young bears expressly that it was gratuitous ("for love and favour,") which quality of his author's right Peter cannot pretend to have been ignorant of.

Pleaded for the Respondents:—The conveyance to the appellant's father being voluntary, he can scarcely be considered as a creditor on the war-randice within the meaning of the act.

As to the 600 merk bond, it was assigned for a valuable consideration; the Judges being fully satisfied by the proofs brought, that the respondent, Margaret, had paid her husband's death-bed and funeral expenses, &c. to the value of L.1130, 7s. 4d. Scots.

It did not appear that the 1000 merks paid to the respondent, Peter, was the same 1000 merks which had been assigned to the respondent, Margaret, by her first husband, there having been no

1726.

NAPIER
v.
NAPIER.

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direct translation of it by her to him. It was a part of 2000 merks stipulated by the marriage articles to be paid to Peter by Margaret's father, in full of all she could claim by his decease, and it was received as such.

But supposing that the 1000 merks had been in consideration of the assignation to Margaret by Liddell, her first husband, yet as Peter received it for a valuable consideration, as a part of his wife's portion, and as there did not then appear, nor for twenty years after, any ground of debt against the assignee, he ought not to be liable to repeat, because there is in the act 1621, an express saving of the rights of all persons purchasing even under such voluntary deeds, "for just and competent prices, or in satisfaction of their lawful debts," from such voluntary assignee; and the case of the respondent, who accepted the 1000 merks in payment of his wife's portion, is expressly within the saving of the act.

Judgment
 29th April,
 1726.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the several interlocutory sentences therein complained of be, and the same are hereby affirmed; and it is further ordered, that the appellant do pay, or cause to be paid to the respondents the sum of L.80 for their costs in respect of the said appeal."

For Appellants, *J. Willes* and *Wm. Lee*.

For Respondents, *C. Talbot* and *W. Hamilton*.

WILLIAM MORRISON of PRESTON- } *Appellant*;
 GRANGE, Esq. - - - - -
 JOHN VISCOUNT ARBUTHNOT, *Respondent*.

1728.

 MORRISON
 v.
 ARBUTHNOT.

27th March, 1728.

MINOR.—FACTUM ILLICITUM.—A discharge by a minor without curators of part of the tocher stipulated in his contract of marriage, being granted privately before solemnization of the marriage, and without the concurrence of the friends who were assisting him in the marriage treaty, reduced at the instance of the granter, on the head of minority and lesion, and as being *contra fidem tabularum nuptialium*.

Judgment affirmed *ex parte*.

Costs—L.80 given to respondent.

[Fol. Dict. II. 22. Rem. Dec. I. No. 1. p. 1. Mor. Dict. p. 9487.]

THE appeal was brought from certain interlocutors No. 2.
 of the 13th January, 11th of February, 6th of June, Entered
 22d of November, and 19th of December, 1716. February 7,
 1727.
 “Counsel appeared for the respondent, but no
 “counsel for the appellant; and the respondent’s
 “counsel being heard,” “It is ordered and ad- Judgment
 “judged, &c. that the appeal be dismissed, and that 27th March,
 “the interlocutors therein complained of be af- 1728.
 “firmed; and it is further ordered, that the ap-
 “pellant do pay to the respondent the sum of
 “L.80 for his costs in respect of the said appeal.”

For Respondent, *Dun. Forbes* and *C. Talbot*.

The report of this case in the Folio Dictionary, and the title of the other reports, are not correct.

1728. <hr style="width: 100px; margin: 0;"/> GORDON v. MURRAY.	ALEXANDER DUKE of GORDON, and ELIZABETH DUTCHESS DOWAGER of GORDON, CHARLES EARL of MURRAY <i>et alii</i> , Respondents.	} <i>Appellants</i> ;
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16th April 1728.

SALMON FISHING.

No. 3. THE question here related to the boundaries by which the rights of the parties to certain salmon fishings in the river Spey and on the sea shore were limited, and to the modes in which they were entitled to exercise these rights ; but as the point fell to be decided by the titles of the parties, by the possession which they had enjoyed, and by certain transactions which had been entered into between their authors and predecessors, no general question of law was involved in the decision.

Entered
5th February,
1728.

The appeal was brought from “ several interlocutors of the 16th of February 1727, and the day of the same February affirming the same ; the 14th of July 1727, and the day of the same July affirming the same,” &c.

Judgment
April 16.

After hearing counsel, “ it is ordered and adjudged, &c. that the said interlocutory sentence of the 16th February 1727, and the affirmance thereof be varied, and do stand in the words following :—‘ That the said Earl of Murray, and other the respondents above mentioned, have the exclusive right of fishing in the channel of the

‘ water of Spey, downwards to the place where
‘ the line which the sea makes upon the coast cuts
‘ the river at high water ; and that they have not
‘ right to fish below that line ; and that the ap-
‘ pellants, the Duke of Gordon, and the Duchess
‘ Dowager of Gordon, have the exclusive right
‘ of fishing with the tug-net from and below the
‘ said line to the sea ; and that they have not
‘ right to fish above that line ; reserving to the
‘ said Sir James Suttie, as now in the right of the
‘ said fishings upon the said river, which belonged
‘ to the Earl of Dunfermline, the said earl his
‘ right of tug-net fishing on the west side of the
‘ said water of Spey, conform to his former pos-
‘ session :’ And it is hereby also ordered and
“ adjudged, that the said interlocutor of the 14th
“ July 1727, and the affirmance thereof, the 21st
“ of the same month, be, and are hereby affirmed.”

1728.

GORDON

v.

MURRAY.

For Appellants, *C. Talbot* and *C. Erskine*.

For Respondents, *P. Yorke*, *Dun. Forbes*, *Ro. Dundas*.

1728. **YORK BUILDINGS COMPANY** v. **MERES.** **The GOVERNOR and COMPANY of UNDERTAKERS, for Raising the Thames Water in York Buildings,** } *Appellants* ;
SIR JOHN MERES, Knight, *Respondent.*

24th May, 1728.

ARRESTMENT.—Arrestment of rents, for security of a sum not payable for four years after the date of the arrestment, ordered to be loosed without caution or consignment, although the debtor was *vergens ad inopiam*.

[Fol. Dict. I. p. 59. Rem. Dec. II. p. 205. No. 106. Mor. Dict. p. 800.]

No. 4. **SIR JOHN MERES**, holding receipts or obligations of the York Building Company to the amount of L.7878, whereby they bound themselves to grant bonds for that sum, payable on the 12th April, **August, 1727.** 1732, raised an action for the purpose of compelling them to grant such bonds, and for payment of them as they became due with interest ; also to pay the bygone interest due upon the receipts.

Pending the action, Sir John used inhibition against the Company ; and he likewise arrested their whole rents and effects in Scotland in security of the sums sued for. Against these arrestments the Company presented a petition, praying “ that the arrestments, in so far as concerns the principal sums, whereof the payment was delayed to “ a distant day, might be loosed without caution February 27, “ or consignment,” upon advising which with an- 1728.

swers, the Lords “ found that the aforesaid arrestments laid on, are effectual both for the principal sums and annual rents libelled, and therefore refused the desire of the petition.”

The appeal was brought from that part of the above interlocutor which finds the arrestments effectual for the principal sums.

Pleaded for the Appellants :—A distant day was agreed for payment of the principal sums, and it was contrary to the meaning and intention of the paction to lay on arrestments for the principal sums till such time as they became due, whereby the rents in the poor tenants’ hands must inevitably perish.

By the law of Scotland, arrestment of rents of lands or the other profits of any estate cannot regularly be used, but after the term of payment of the sum ; and it is unjust to lock up a debtor’s effects when the creditor cannot take them.

The respondent is sufficiently secured for the capital debt, having used an inhibition, which bars the appellants from selling their estate, or contracting debt thereon to the prejudice of the respondent’s debt. By these arrestments all the rents of the appellants’ estates are stopped, by which they are disabled from paying yearly their annuitants with whom they contracted under several acts of parliament.

Pleaded for the Respondent :—The arrestment prevents the tenants from paying rent only until security be given, and is loosed upon such security ; so that it is far from an entire bar to the ap-

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YORK
BUILDINGS
COMPANY

v.
MERRIS.

Entered
March 15,
1728.

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YORK
BUILDINGS
COMPANY
v.
MERES.

pellants receiving their rents in all events until the money should become payable. If no arrestment could be used until the term of payment, it might be very inconvenient and even fatal to the creditor, since the debtor might in the mean time dispose of every thing that might be the subject of payment.

Although the circumstances of the debtor at the time of agreement may be such as not to give any occasion to require security for payment at a day to come, yet if by accident or otherwise the circumstances alter, it can never be presumed to have been the intention of the creditor to tie up his own hands from procuring the best security he can, by pursuing the methods which the law has provided in such cases; otherwise it might be in the power of the debtor to dispose of or encumber his estate, and thereby deprive the creditor of all remedy, or other creditors might affect and carry off the estate while he was obliged to be silent. This view is strengthened by the fact, that the appellants have actually stopped payment to all their other bond creditors; and, subsequent to the receipts granted to the respondent, they have been sued by other creditors who are carrying on diligence against the estate. Even since the present arrestments were laid on, they have themselves given to their annuitants an universal infeftment over their whole estate, for above L.10,000 per annum; on account of which, although the arrestments were loosed, they could have no access to receive the rents.

Judgment
May 24, 1728.

After hearing counsel, "it is ordered and ad-

“judged, &c. that so much of the said interlocutor complained of in the said appeal, as finds the arrestments laid on effectual for the principal sums, be reversed; and it is hereby further ordered, that the said Lords of Session do order the arrestments, in so far as concerns the principal sums, whereof payment is delayed to a distant day, to be loosed without caution or consignation.”

1798.

YORK
BUILDINGS
COMPANY
v.
MERES.

For Appellants, *Dun. Forbes, C. Talbot, Alex. Garden.*

For Respondents, *P. Yorke, Ch. Areskine, Will. Hamilton.*

This reversal is not noticed in any of the reports. The judgment of the Court of Session is founded on by Erskine, b. iii. t. 6. § 10.

<p>1729.</p> <hr/> <p>ROYAL BANK ". BANK OF SCOTLAND.</p>	<p>The GOVERNOR & Co. of the Royal Bank of Scotland, and ANDREW COCHRANE, Merchant in Glasgow, The GOVERNOR & Co. of the Bank of Scotland, - - - - -</p>	<p>} <i>Appellants ;</i> } <i>Respondents.</i></p>
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9th May, 1729.

BANK.—LEGAL DILIGENCE.—In a case betwixt the two banks, it was found by the Court of Session that neither horning, inhibition, nor arrestment, were competent against the bank of Scotland, upon their notes or tickets, the diligence being done *in emulationem*.

This judgment was reversed.

[Fol. Dict. I. 65. Mor. Dict. p. 875.]

No. 5. 1695. THE Bank of Scotland was incorporated by act of parliament, a clause of which provides “that summary execution by horning shall proceed upon bills or tickets drawn upon or granted by, or to or in favours of the said bank, and the managers and administrators thereof for the time, and protests thereon, in the same manner as is appointed to pass upon protests of foreign bills, by the 20th act of parliament 1681 ; and that no suspension pass of any charge for sums lent by the said bank, or to the same, but only upon discharge or consignment of the sum charged for.”

The bank being obliged to make a temporary stoppage of payment, the appellant Cochrane, who held their notes to the amount of L.900, obtained

cash for them from the Royal Bank, and thereafter (in trust for the Royal Bank) applied for letters of horning against the Bank of Scotland. After various proceedings the court refused to grant warrant.

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 ROYAL BANK
 v.
 BANK OF
 SCOTLAND.
 June 25, 1728.

The Royal Bank then raised an action against the Bank of Scotland for L.10,255 due upon their notes, with interest and expenses, and upon the dependance of this action applied for letters of inhibition and arrestment. It appears that the Bank of Scotland produced their books, in order to show that they had funds more than sufficient to answer all demands upon them. The case being reported by the Lord Ordinary, the lords refused to pass the bill; and upon an application of the Bank of Scotland, they directed the clerks not to write upon any such bill which might be presented, until the Bank had an opportunity of seeing the same at least twenty-four hours before writing upon it.

The principal sums due were subsequently paid, but received under protest that the expenses incurred should likewise be paid; and conceiving that the proceedings of the Court, in refusing the diligence, had the effect of establishing a privilege in favour of the Bank of Scotland, the Royal Bank presented a petition complaining thereof, which, with another afterwards given in, was superseded till the first day of June then next.

The appeal was brought from the interlocutors of the 2d, 4th, and 9th of April; 25th and 28th June; 11th and 26th July, 1728; and the 25th and 27th Feb. 1729.

Entered
 March 11,
 1729.

1729.

ROYAL BANK
v.
BANK OF
SCOTLAND.

Pleaded for the Appellants :—1. When the respondents were made a corporation, the legislature, in order to give their notes and bills the greater credit, and to enable them to recover more easily money due to them, thought proper that they should both sue and be sued summarily; and therefore the act enables the Bank to sue summarily, and gives the same remedy to their creditors which the Bank has against their debtors. As the respondents have on all occasions exercised that privilege against their debtors, it would be most inconsistent to deny the same privilege of summary execution against them, and expressly contrary to the words of the Act.

2. It is settled law, that every creditor may, by action, demand payment of the money due to him, and, pending such suit, may inhibit and arrest, and upon the arrestment may, by proper process, make the sums arrested liable to satisfy his demand; and the creditor has the same right to demand from the Court the proper process for recovering his debt, as he has to demand payment from the debtor; for his right of debt would be useless, if the remedy given him by law for recovering that debt were denied, or rendered ineffectual. There is no instance of an arrestment or inhibition being refused under similar circumstances.

The production of their books and accounts did not at all supersede the necessity or expediency of using diligence; as whatever their funds might then be, there was no security that they might not be alienated, or fresh obligations contracted in the mean time. Whatever the circumstances of the

debtor may be, that will not answer the creditor's claim for ready money ; and as the law has pointed out a method for recovering his debt, he has a right to avail himself of that proper process ; and nothing less than a power to dispense with the laws, can prevent him from the exercise of the legal privilege of suing for his debts. This would be in the nature of granting protections for civil debts, which the Claim of Rights declares " to be directly contrary to the known law, statutes, and freedoms of the realme."

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 ROYAL BANK
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 SCOTLAND.

3. It was still more unreasonable for the Court, not only to refuse granting the usual diligences, but to establish in some measure a standing privilege in favour of the respondents, that the diligences and processes, which in all other cases pass of course, should be in their case only stopt from being issued, till they have an opportunity of being apprised thereof, and thereby prevent the issuing of the same.

Pleaded for the Respondents :—1. By the act of 1681, c. 20. king Charles II. (referred to in the clause of the bank act quoted above,) summary horning may pass *only* upon bills of exchange that are protested and registered within six months after the date in case of non-acceptance, or after the falling due thereof in case of non-payment. But the respondents' notes, upon which the appellants demanded that process, bore date, and were due several years before they were protested and registered ; so that if they were ever intended by the bank act to be subject to such process, the appellants were out of time to demand it upon these notes.

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 SCOTLAND.

By the law and practice of Scotland, a summary horning never was or could be issued upon any bill or contract, but at the risk of the person expressly named therein, or in the endorsement or assignment thereof; therefore if such process could be supposed to have been intended by the bank act to pass upon the respondents' cash notes, payable to A. B. or bearer, it could only be obtained at the instance of A. B. or the person to whom A. B. had specially assigned the same.

But the respondents insist, that their current notes for cash, not lent to them, but deposited with them as a bank for circulation of credit, were not intended by the act of Parliament to be made subject to immediate execution, which would be inconsistent with the nature of a bank. Besides, it was never known to be the practice to protest promissory or cash notes.

2. There is no statute appointing the processes of arrestment and inhibition to pass of course at the suit of any creditor; but they have been introduced by custom and the practice of the Court of Session, and are very often refused when the Court sees cause, especially when it appears that they are demanded, not in reality for security of money due, but for envy or emulation against the debtor; which appeared to be the nature of the appellants' demand, they having industriously possessed themselves of the respondents' notes, in order to make them stop payment, and then distress them with all manner of legal process.

3. As to the order to the clerk of the bills, the appellants are not parties thereto, nor do they pre-

tend in their petitions for recalling it, or in their appeal, that they had applied for any process against the respondents, which was stayed by that order. Besides, the Court has not refused to recall that order, but only deferred the consideration thereof till the next term, which is frequently done at the latter end of a term. There is, therefore, no foundation for an appeal on this head.

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It is most equitable that every party should be heard who has any thing to say in his defence, before warrant for diligence be issued against him ; and no doubt the Court would have made the same order for any other persons in the same circumstances, and upon the same reasons as appeared in the case of the respondents.

After hearing counsel, " it is ordered and ad- Judgment
" judged, &c. that the several interlocutory sen- May 9, 1729.
" tences complained of be and are hereby reversed ;
" and it is hereby further ordered, That the appel-
" lants be at liberty to apply to the said Lords of
" Session, to cause their costs and expenses in the
" proceedings above mentioned to be taxed ac-
" cording to the course of their Court.

For Appellants, *P. Yorke, Dun. Forbes, C. Talbot*, and *Will. Hamilton*.

For Respondents, *J. Willes* and *Will. Grant*.

This reversal is not noticed in the reports of the case.

1730.

MOODIE

v.

STEWART.

ELIZABETH MOODIE, Spinster, a Pau- } *Appellant*;
 per, - - - - - }
 JOHN STEWART of Burgh, *Respondent*.

6th February, 1730.

PROVISION TO HEIRS AND CHILDREN.—The heir under a marriage contract may, during his father's lifetime, renounce for himself and his successors all claims under the contract.

IDIOTRY.—In a reduction of a deed *ex capite furoris*, after the death of the granter, a general allegation of idiotry not relevant.

No. 6.
1638.

ROBERT, the son of Edward Stewart of Burgh, intermarried with Barbara, the daughter of Hugh Halcrow. By the marriage settlement, Edward Stewart, on the one hand, became bound to convey his lands of Burgh and others, in favour of his son Robert and the heirs of the marriage; and on the other part, Hugh Halcrow conveyed his lands of Cletts, &c. to the said Edward Stewart, who again conveyed them in favour of his son Robert, and the heirs of the marriage. Of this marriage there were born two sons,—Edward, who died young, and Robert,—and one daughter. Robert, the father, having survived his wife, entered into a second marriage, by the articles of which he settled all the above lands on the heirs to be procreated of the marriage. By this second wife he had issue three sons, of whom John (the respondent) was the eldest.

1661.

Robert, the father, by successive dispositions conveyed the whole lands in favour of his son John, and the last of these dispositions recites, as the consideration of it, that John had undertaken to pay all the granter's debts, and the portions which he had appointed for his other children.

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MOODIE
v.
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1666.
1666.
1686.

Of this date, Robert, the father, with concurrence of John, conveyed the lands of Burgh in favour of his son Robert, in consideration of which, the latter executed a deed of renunciation, (which narrates this grant,) whereby he renounces all claim whatever competent to him under his mother's contract of marriage.

February
1687.

In 1691, an agreement was entered into between Robert, the son, and John, whereby, upon John's granting a bond for an annuity to him and his wife of 300 merks per annum, and for a sum of 4000 merks to him and his wife in liferent, and their son in fee, he conveyed to John the said lands of Burgh. Robert the son enjoyed this annuity until his death, when he left the bond for 4000 merks to his son Robert.

1691.

This Robert (the grandson) assigned the bond for 4000 merks to Elizabeth Moodie, (the appellant,) who had been at the expense of his maintenance and education, and likewise executed in her favour a farther bond for L.60,000 Scots, upon which she obtained a decree of adjudication. Founding upon this title to pursue, she instituted an action of reduction for setting aside John's title as null and void, being at variance with the provisions of the foresaid contract of marriage. A second ground of reduction was, that the renunciation had been

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STEWART.

obtained by fraud and circumvention, the granter being *non compos mentis* at the time of signing it.

John produced as his title the several conveyances by his father in his favour, and likewise the agreement 1691, and the discharge and renunciation 1687, above mentioned.

It was pleaded for Elizabeth Moodie;—although Robert, the son of the first marriage, was heir presumptive of that marriage, yet in reality he had no right in him. During his father's lifetime, he had no more than an expectancy, which he could not sell or dispose of in prejudice of his successors; and he having died without serving heir, or making up any title to the lands, he never acquired the power either to convey or renounce his right, and his son Robert became the heir of the marriage to whom the provisions were made. The pursuer, therefore, having by her adjudication carried all right that was in him, had good title to insist that the renunciation, (granted by one, who, in his father's lifetime, could not possibly be his heir,) had no effect to bar the action of the subsequent heir, who had legally completed his titles.

Answered for John,—1. Robert being the only son of the marriage, *constitit certissime de persona*, that he was the person for whom provision was made under the marriage contract, and there could be no reason to hinder him from accepting present satisfaction in lieu of that provision. In consideration of that satisfaction, he might make what agreement he chose, and might renounce and discharge for himself and his issue who were not then in existence. If it were not so, then the heir

of a marriage could never, during his father's lifetime, make any bargain or arrangement for his present advantage.

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HOODIE

v.

STEWART.

2. Robert, the father, continued full fief of the estate, notwithstanding the marriage contract, and he might burden or convey the lands. If the conveyance was gratuitous the son might challenge it. This was a right which the son had in him, even during his father's lifetime, and which he might renounce to the effect of validating his father's deed. Death-bed deeds may thus be made unchallengeable even during the granter's lifetime.

The pursuer (in a duply) offered to prove that Robert was a person furious and fatuous, and that he was circumvented when he granted the deed of renunciation.

The Lord Ordinary, of this date, pronounced June 11, 1726. the following interlocutor: "Repels the objections
" against the writs produced, founded upon the
" first contract of marriage, in respect of the reply,
" and the discharge and renunciation by the heir
" of that marriage also produced; and therefore
" finds the writs produced by the defender sufficient to exclude; and makes *avisandum* there-
" with; but refuses to grant certification, without
" prejudice to the pursuer to insist upon her further
" reasons of reduction and duply, that the granter
" of the said renunciation was a weak man, and
" the discharge and renunciation was unduly elicited from him, or that he was fraudulently imposed
" upon in the granting thereof, or that he was
" furious, fatuous, or under other natural incapacities for granting of the deed."

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MOODIE

v.

STEWART.

July 8, 1726.

July 24, 1726.

February 21,
1727.

This interlocutor, being brought before the whole Court upon a petition and answer, was, of this date, adhered to ; and a second reclaiming petition was refused without answers.

On the other ground of reduction, the Lord Ordinary allowed “ the pursuer before answer to “ prove *prout de jure* that Robert Stewart, the “ granter of the said discharge and renunciation “ founded on by the defender, was a weak man, “ and that the discharge and renunciation was “ unduly elicited from him, or that he was fraudu- “ lently imposed on in the granting thereof, or “ that he was furious, fatuous, or under other men- “ tal incapacity for granting of the said deed, and “ assigns the first of June next to the pursuer’s “ procurators for proving thereof, and grants dili- “ gence.”

Against this interlocutor John petitioned, on the grounds, *first*, That even if it were true that the granter had been circumvented, his repeated homologation of the deed was proved by regular receipts for the annuity which were produced ; and *second*, As to the furiosity, that it was not competent to plead it at a period so long after the granter’s death ; but at any rate, that the pursuer must particularise the circumstances from which the furiosity is inferred, and must also state that the granter was under the influence of the disorder, not only when he executed the deed, but likewise at the time of each subsequent act of homologation.

June 10,
1727.

The Court, of this date, “ Find the general al- “ legation of furiosity as proposed by the pursuer “ not relevant, and ordain her to give in a parti-

“ cular condescendence of the facts from which
 “ she would infer the same, of the time and con-
 “ tinuance of the furiosity, and the manner of
 “ proof.”

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MOODIE

v.

STEWART.

A reclaiming petition against this interlocutor was refused, and, of this date, the Court pronounced their final judgment on the whole cause as soilzieing the defender.

January 17,
1728.

The appeal was brought from “ several interlocutors, of 11th June, 8th and 24th July, 1726 ; 10th June, 18th day of July, 1727, and 17th January, 1728, made on the behalf of John Stewart; and praying that the same may be reversed, and that the interlocutor of the Lord Ordinary 21st February last may be affirmed.”

Entered
February 9,
1728.
Amended
February 28.

The arguments in the House of Lords were the same as those of which a summary has been given above.

After hearing counsel, “ it is ordered and adjudged, &c. that the appeal be dismissed, and that the several interlocutors therein complained of be, and are hereby affirmed.”

Judgment
February 6,
1730.

For Appellant, *P. Yorke* and *Will. Hamilton*.

For Respondent, *Dun. Forbes* and *C. Talbot*.

It cannot be gathered with certainty from the appeal papers whether or not Robert survived his father. As this is an important point, and was inquired into with much anxiety in deciding the case of *Routledge v. Carruthers*, (May 19, 1812, Fac. Col. Dow, IV.) it may be remarked that several circumstances support the belief that the father predeceased. In particular, it is mentioned by the respondent, that “ he had enjoyed all his father’s estate, except the lands of Burgh, for more than 40 years ; and the lands of Burgh he has possessed without molestation from the year 1691.” Now it is clear that John had not taken immediate possession in virtue of the conveyances by his father in his favour, because his father, in 1687, disposes part of

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MOODIE
v.
STEWART.

the lands with his concurrence. This is the last transaction in which the father is stated to have borne a part; so that it is probable his death happened soon after, which would be above forty years prior to the date of the appeal paper. In 1691, his son John is found transacting for the first time *alone* with Robert, who was then in possession of the lands of Burgh, settled on him by his father.

It is also founded upon in the argument, that Robert had died without serving heir to his father, which statement almost necessarily implies the fact that the son had survived.

This presumption is further supported by the probable age of the father, the marriage having taken place in January 1638, while the son lived, at least until 1700. There is some uncertainty as to the precise period of his death. In the appellant's case, it is said, that "Robert the son died in 1700;" whereas, in the respondent's case, he is said to have "received annually for *thirteen* years his annuity," which had been settled on him in 1691, according to which statement, he must have survived till 1704.

GEORGE SMOLLETT, Provost, <i>et alii</i> ,	} <i>Appellants</i> ;
Magistrates of Dumbarton, -	
WILLIAM BUNTEIN, <i>et alii</i> , Bur-	} <i>Respondents</i> .
gesses of Dumbarton, - - -	

19th February, 1730.

BURGH ROYAL.—DESUETUDE.—ELECTION.—The acts 1503, c. 80, 1535, c. 26, and 1609, c. 8, which disable persons not being actual traders and residents within the burgh from being elected Magistrates, found to be in desuetude.

A councillor having been imprisoned on the eve of the election in virtue of a warrant obtained upon information of the adverse party—found not sufficient to avoid the election, there being such a number in favour of it as would have formed a majority notwithstanding he had been present.

No. 7. ON the eve of the election of the Magistrates for the burgh of Dumbarton, one of the councillors, named Porterfield, being forcibly carried off, and

other acts of violence committed by the adverse party, David Colquhoun, who was one of the electors, was, in virtue of a justiciary warrant, committed to the Castle of Dumbarton, as having been principally concerned in these outrages. On the day of election the council separated; eight of their number (being a quorum) made choice of the appellants, while the remaining six elected the respondents.

The respondents brought an action of reduction and declarator for setting aside the election of the appellants, and declaring themselves duly elected.

They insisted that the appellant, George Smollett, was no trafficking merchant, nor residenter in the town of Dumbarton, and therefore could not, because of the acts 1503, c. 80, 1535, c. 26, and 1609, c. 8, be elected provost. To which it was answered, that although by the sett of the town, the burgh is said to be made up of merchants and tradesmen; yet according to the constant practice, any person, although not of any of the trades or companies of mechanics, was capable of being elected a magistrate; —that although Smollett did not trade, yet he was a considerable proprietor in the town, and resided there for some time every year; and moreover that the statutes founded on were in desuetude.

The Lords found “ the reason of reduction, viz. ^{February 6, 1729.} that George Smollett was not a merchant residing in the town of Dumbarton, relevant and proved; and therefore reduced his election as “ provost.”

It was next pleaded that the election ought to be reduced *in toto*, because it was carried on

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SMOLLETT

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without a quorum, and the want of the quorum was occasioned by the imprisonment of Colquhoun in consequence of the devices of the appellants. It was answered that the imprisonment was legal ; but if it had been otherwise, the appellants were not accessary to it ; and even if he had been at liberty, and had voted against them, still they would have had a decided majority.

February 8.

The Lords found, “ that the execution of the
“ warrant against David Colquhoun, upon an in-
“ formation exhibited against him of an atrocious
“ crime, by incarcerating him in the Castle of Dum-
“ barton, was a contrivance of design, to disable
“ him from being present at the ensuing election ;
“ and they found it proved, that Provost George
“ Smollett, and those adhering to him, were acces-
“ sary to the said contrivance and execution, which
“ they found relevant to annul the election of the
“ said Provost George Smollett, and the other ap-
“ pellants, the magistrates and council joining with
“ him ;” and they likewise found it proved, “ that
“ Archibald Porterfield was violently seized and
“ carried away to an island of Lochlomond, which
“ they found was done by a contrivance designed
“ to disable him to attend at the said election ; and
“ that William Buntein, and the other magistrates
“ joining with him, were accessary to that contri-
“ vance, which they found relevant to annul the
“ election of the said William Buntein, and the
“ other magistrates joining with him ; and there-
“ fore reduced both elections *in toto*.”

A petition against that part of the judgment which annulled the election of the appellants was refused.

The appeal was brought from the interlocutor of the 6th February, 1729, part of the interlocutor of the 8th February, and the interlocutor of the 27th February, in the same year.

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SMOLLETT
v.
BUNTEIN.
Entered
March 15,
1739.

Pleaded for the Appellants.—1. Although the laws of James the V. and VI. direct that no person be chosen provost of a burgh, but merchants and actual traffickers within such burgh, yet these statutes are fallen into desuetude, and a contrary custom has prevailed in this town and other burghs in Scotland. That acts of Parliament, by the construction of the laws of Scotland may, by falling into disuse, lose their force, is certain; and, upon this principle, many other statutory regulations touching the government of royal burghs, are abrogated by custom without any formal repeal.

2. The imprisonment of Colquhoun can afford no foundation for setting aside the election of the appellant, as it cannot be supposed to have been done with a view to disable him from voting; for it is certain that the appellant had a decided majority, having nine to seven, (including Colquhoun's vote,) and although the respondents had carried off Porterfield, as the Judges have found, yet even then the appellants would have had a majority of eight to seven, so that they were under no necessity of preventing Colquhoun from voting.

3. Supposing the imprisonment of Colquhoun to have been unjust, yet as none of the appellants (the provost excepted) had any share in it, it cannot annul the election of the other appellants, otherwise it would be in the power of any faction in a

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SMOLLETT

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BUNTEIN.

town, when they cannot themselves succeed, at least to avoid the election of their opponents.

Pleaded for the Respondents:—1. Such acts concerning public polity, as these now founded on, cannot fall into desuetude, as has been always adjudged by the Court of Session.

The acts in question are not gone into disuse, but are in strict observance in all the considerable burghs in Scotland, though encroachments upon the laws have been made in some small burghs, by the too great power and influence of neighbouring proprietors. Nor can the error or abuse committed in a few particular towns abrogate the general law of the nation, while no such practice is universal, but the statutes are observed in most of the burghs, and when the judges have decreed conform to the laws in every case where judgment has been pronounced on the point.

2. The using of violence and carrying off any one councillor is sufficient to void the whole election; and the judges have justly so decreed in every case. It cannot be known how the votes would have gone, had Colquhoun been present. His reasoning and influence might have persuaded others to support him in obedience to so express laws; persons undetermined might have followed the majority, nor can it be known how many were intimidated by his imprisonment, which, it appears from the whole circumstances, could be for no other reason but to disable him from voting.

3. The provost and other appellants were all one party, acting upon the same interest towards the same end, and the objection of violence being

not a personal objection only, but a real objection against the whole proceeding, must void the election, since if the violence had not been done, it cannot possibly appear how the election would have gone.

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7.

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At all events, the two individuals upon whose false information the warrant of commitment was obtained, were directly guilty, and if they, with the provost, are set aside, the majority is in favour of the respondents.

After hearing counsel, "it is ordered and adjudged, &c. that the said several interlocutors complained of be and are hereby reversed; and "it is hereby further adjudged and declared, that "the election of the said provost George Smollett, and the other appellants be, and the same is "hereby confirmed and established."

Judgment
Feb. 19, 1730.

For Appellants, *Dun. Forbes, C. Talbot, and Will. Hamilton.*

For Respondents, *P. Yorke, and Ro. Dundas.*

1730.

DOUGLAS
v.
STRATHNAVER.

ARCHIBALD, DUKE OF DOUGLAS, *Appellant* ;
WILLIAM, LORD STRATHNAVER, *Respondent*.

25th February, 1730.

TAILZIE.—REPARATION.—An heir of entail having made up titles in fee-simple to the entailed estate, and burdened it with debts, contrary to the provisions of the entail, which had not been recorded,—his representatives were found liable, at the instance of the next substitute, for reparation and damages, to the effect of disburdening the estate of those debts.

Costs—L.50, given to Respondent.

[Fol. Dict. II. p. 435. Rem. Dec. I. No. 104, p. 198. Mor. Dict. p. 15373.]

No. 8. **JEAN, Countess of Sutherland**, executed a disposition and entail of her lands of Rosebank in favour of Archibald Earl of Forfar, her eldest son, and the heirs male of his body; whom failing to William Lord Strathnaver (her grandson by a second marriage) and the heirs male of his body; whom failing to certain other substitutes. By this deed, the granter obliged “herself, her heirs and successors, under the conditions therein expressed, “to infest the said Archibald Earl of Forfar, and “the other heirs of provision,” and to grant procuratories and other writings necessary for that effect. It is expressly provided and declared, “that

" it should not be in the power of the said Earl
 " of Forfar, or of the heirs of provision before
 " mentioned, to contract debts upon the foresaid
 " lands, or to affect the same with any sum ex-
 " ceeding two years rent for the time : " And fur-
 " ther, " that it should not be in the power of the
 " said Earl of Forfar and his heirs of provision,
 " to give away, dilapidate, sell, or wadset the said
 " lands, or to allocate or bestow them in fee or
 " jointure to their ladies ; " and in the event of
 " their contravening, " then and in that case these
 " presents shall be void and null, in so far as con-
 " ceived in favour of the person so acting, and
 " the next heir of provision above mentioned shall
 " thereby succeed in his right and place."

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 DOUGLAS
 v.
 STRATHNAVER.

The deed contained a clause dispensing with delivery, but it was not recorded in the register of entails, and was found in the repositories of the Countess at her death in 1714.

Archibald, Earl of Forfar, the institute, predeceased his mother, and upon her death, Archibald, his son, (Earl of Forfar,) passing by the above entail, made up titles to the estate by a service as heir of line to her. Having affected the estate with debts to a large amount contracted by himself or his father, he died in 1715, whereupon his other family estates devolved upon the Duke of Douglas in terms of the investitures.

Lord Strathnaver, having then served himself heir of provision to the first Earl of Forfar in the lands of Rosebank, brought an action against the Duke of Douglas, as representing the Earl of Forfar, concluding that he should be ordained to dis-

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v.

STRATHNAVER.

incumber the estate of the debt with which it had been charged in violation of the terms of the entail.

He argued that the Countess of Sutherland, being absolute proprietor of the lands, had power to settle them under whatever conditions she thought proper ; and that having by her settlement bound and obliged herself and her heirs to resign the lands, for new infeftment in terms and under the conditions thereof, and prohibited the persons in whose favour they were conveyed, from charging them with debt under the pain of forfeiture, there was a good claim competent to the next substitute to whom the succession had opened, against the representative of her heir who had neglected so to resign the estate, and by whom debts had been laid upon it, contrary to the prohibition of the entail.

It was answered, that the entail, not having been recorded in terms of the act 1685, was not obligatory, and besides that the Earl of Forfar was the heir at law of the Countess, and therefore at liberty to make up his title to the lands in that character, there being no clause in the deed by which (as is usual and necessary in such cases) the heirs of entail are prohibited from claiming under any other title.

The Court found “ that the heirs of tailzie in “ the Countess of Sutherland’s disposition, could “ not alter the order of succession therein expressed, and that the last Earl of Forfar, who “ was infeft as the Countess’s heir of line, was “ obliged to have resigned in the terms of the procuratory contained in the tailzie, and that the “ appellant who was heir of provision to the said

"Earl of Forfar, was bound and obliged to discharge the said Countess her tailzied estate, and to relieve her heirs of tailzie of the debts of the family of Forfar; and repelled the whole other defences and decerned." This judgment was adhered to; and some other proceedings ensued which it is not necessary to detail.

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DOUGLAS

v.

STRATHNAVER.

The appeal was brought from several interlocutors of the 2d and 24th February, and the 9th and 25th July, 1728.

Entered Feb.
4, 1729.

*Pleaded for the Appellant:—*1. By the act 1685, it is provided that such entails only shall be binding as are recorded agreeably to the directions of the act; which not having been done here, the entail can only be regarded as a destination which was alterable at pleasure by any of the heirs.

The mere nomination of heirs without prohibitory clauses, is not effectual against the heir, and as the prohibitory clauses have no force or effect unless recorded, it follows that in the present case, the prohibitory clauses not having been recorded, the destination to the particular line of heirs can have no effect to debar any of the substitutes from altering it.

2. But supposing that the entail had been recorded, it could only have been obligatory upon the Earl of Forfar in case he had chosen to possess the estate by that title; but as he had another title, as heir to his grandmother, he was at liberty to claim upon it, and thereby create in himself an absolute fee, especially as there was no clause in the entail restraining him from doing so.

For the deed was an actual conveyance of the

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DOUGLAS
v.
STRATHNAVER.

estate, and not merely an obligation to convey ; the obligation to grant procuratories, &c. was only accessory to the conveyance, and the conveyance not having been accepted, but repudiated, the accessory obligation necessarily fell to the ground. But even on the supposition of its being still binding, it was in favour of the Earl of Forfar, who consequently became both creditor and debtor in respect of the same obligation, and since he did not accept of the credit, no subsequent heir could take it up under his right as heir to him.

3. Wherever, in an entail, effectual care is taken in terms of the act, that no deed or debt of the heir in possession can affect the estate, the entail must subsist and be obligatory according to the intention of the maker. But where no such effectual provision is made, but on the contrary, the deeds and debts of the heir are, notwithstanding the entail, an effectual charge upon the estate itself, the law has provided no remedy to make good to the next substitute the damage that he may suffer through the defect and lameness of the settlement.

*Pleaded for the Respondent:—*1. Although by the act 1685, it was declared lawful for persons to entail their estates with clauses, prohibitory and resolute, and that such entails, being duly registered, should be effectual against creditors ; yet by that law the power which every person previously had of limiting and restraining his heirs with regard to one another, was not impaired. The intention of the law was only to ascertain how creditors might with safety contract with a person having

an entailed estate, for which end it was declared that they were not to be affected by the conditions of the entail, unless it was properly recorded ; but in questions between the heirs, entails, although not registered, as they are the deeds of the ancestor, must be still as binding upon the heir as they would have been before the passing of the act.

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DOUGLAS
v.
STRATHNAVER.

3. The Countess of Sutherland, by this entail, in express words obliged her heirs to resign the lands in favour of the persons, and under the conditions mentioned in the deed ; and as resignation made in terms of the obligation would effectually bar any claim as heir at law, there was no occasion to add a proviso " that the heirs should not possess " by any other title." Their doing so was effectually prohibited by the condition whereby they were bound to resign under the conditions of the entail. The Earl of Forfar being himself served heir at law to his grandmother, became thereby obliged to the performance of all obligations entered into by her, and consequently to resign in terms of the deed.

Every substitute is a creditor under this obligation, as well as the institute, whose renunciation therefore of the right of credit competent to himself, can have no effect to bar the claim of the other heirs of entail.

3. The Earl of Forfar's estate, to which the appellant has succeeded, must clearly be liable for the present claim ; otherwise, it is evident that both the act of parliament, and entails made in terms of it would avail nothing ; for the heir in possession, by merely omitting to insert in the subsequent con-

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veyances and infeftments, the prohibitory and resolutive clauses, would be at perfect liberty to charge the estate with debts to the full value of it, and to apply the money in what manner he might think fit.

After hearing counsel, it is ordered and adjudged, &c. "that the appeal be dismissed, and "the interlocutors therein complained of be affirmed; and it is further ordered that the appellant do pay to the respondent the sum of L.50 "for his costs in respect of the said appeal."

For Appellant, *P. Yorke, Dun. Forbes, and Rob. Dundas.*

For Respondent, *C. Talbot, and Will. Hamilton.*

1730.

**MAGISTRATES
OF PERTH
v.
THE
PRESBYTERY.**

**The MAGISTRATES and TOWN COUN-
CIL of PERTH,** } *Appellants ;*

**Messrs. THOMAS BLACK, WILLIAM
STEWART, and WILLIAM WILSON,
Ministers of Perth ; GEORGE
FAUHNEY and GEORGE ROBERT-
son, Hospital Masters of Perth ;
Mr. ROBERT LYON, Moderator
of the Presbytery of Perth, for
himself and on behalf of the said
Presbytery, as overseers of the
said Hospital,** } *Respondents.*

6th March, 1730.

TITLE TO PURSUE.—A presbytery may pursue in the name of a kirk-session within their bounds, upon a grant made to that kirk-session for charitable uses.

PRESCRIPTION.—Act 1617, c. 12.—Possession during forty years without a title not sufficient, in order to plead the negative prescription.

[Fol. Dict. ii. p. 98: Mor. Dict. p. 10723.]

JAMES VI. made a grant to “the poor of Perth” of all lands, tenements, &c. which had belonged to the religious houses within that burgh, and by the charter the rents and yearly income of the same are appointed to be received by a collector, or hos-

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1569.

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1587.
 1592.

pital master or masters, (to be annually chosen by the kirk session of the burgh,) who are to apply the same to the pious uses mentioned in the charter, and to be accountable for intromissions to the superintendent, the said minister and elders, or to the exchequer if required. Infestment followed upon this grant, and it was subsequently ratified by two acts of Parliament.

After the lapse of some time, the purposes of the grant were neglected, and during upwards of forty years two of the subjects contained in it, (called *Friars Land* and *Charter House*,) had been possessed by the Magistrates and Town Council of Perth, and the income arising from them applied exclusively to the use of the burgh. Under these circumstances, an action of reduction, improbation, declarator, and count and reckoning, was brought by the presbytery of Perth, in their own name, and in that of the kirk-session of the burgh, against the Magistrates and Town Council, the purpose of which was to compel production of their title deeds, if they had any; and to have the same reduced; to have it declared, that the pursuers had the only undoubted right to the lands; and to make the magistrates accountable for the rents and profits unduly received by them.

The kirk-session disclaimed the suit; upon which it was pleaded by the defenders that the presbytery had no right to insist in name of the kirk-session, by whom alone the action could be competently brought. The Lord Ordinary reported this plea to the whole Lords, who, of this date found, "That
 July 12, 1728. " the ministers and elders of Perth cannot disclaim

“ the process, and sustained process at the presby-
 “ tery’s instance, in order to exclude any interest
 “ the Magistrates of Perth can pretend to the hos-
 “ pital lands, and remitted to the Ordinary to pro-
 “ ceed in the said cause accordingly.” This in-
 terlocutor was reclaimed against by the minister and
 elders, and their petition refused, of this date, by an
 interlocutor finding, “ That the presbytery might
 “ carry on the process in the name of the said
 “ ministers ;” and remitting to the Lord Ordinary
 to hear parties upon the other points of the libel.

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 MAGISTRATES
 OF PERTH
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July 23.

It was next objected by the defenders, that the
 declarator was barred by their possession during
 more than forty years, the pursuers’ right to the
 lands being lost *non utendo*. It was answered by
 the pursuers, that their right could not be held
 to be prescribed, in a question with the Magis-
 trates, who never had any title whatever to the
 lands. The Lord Ordinary “ repelled the alle-
 “ geance of prescription in respect of the answer,
 “ and found that the lands and others libelled do
 “ pertain and belong to the hospital of Perth ;”
 and by another interlocutor he sustained the action
 of mails and duties, allowing a proof of the posses-
 sion and of the yearly rents, &c. These judgments
 were brought before the whole Court upon a peti-
 tion and answers, and, after a hearing in presence,
 were adhered to.

July 25.

July 26.

Nov. 21,
 Dec. 24.

Thereafter the Magistrates produced as their
 title, a charter granted to the town by Robert II.
 of “ Totum et integrum burgum de Perth, cum
 “ omnibus aliis et singulis libertatibus, asiamentis et
 “ justis pertinentiis quibuscunque ad dictum bur-

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 MAGISTRATES
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“ gum spectantibus, tam infra burgum quam extra.”

And it was further maintained, that the charter, &c. upon which the pursuers claimed, were voided by the act of Parliament (1592), whereby all grants by the crown of lands which had belonged to the religious houses were revoked. It was answered, *first*, That the lands in question could not be included in the charter by Rob. II. produced, seeing that they had been the property of the friars long after the date of that charter. *Secondly*, That the ratification by Parliament of the king's grant is posterior to, and contains an express exemption from the act of revocation passed the same year. The Feb. 5, 1729. Lords “ adhered to the Lord Ordinary's interlocutor, and refused the desire of the bill.”

Entered
 Feb. 24.

The appeal was brought from the interlocutors of the 12th, 23d, and 25th July, the 21st Nov. the 24th Dec. 1728, and 14th Jan. and 5th Feb. 1729.

Pleaded for the Appellants:—1. None can sue any action upon a real right, but such as are vested with the property, and by the grants founded on, the ministers and elders of the burgh of Perth are the grantees in trust, and they have disclaimed this action.

2. Supposing the presbytery to be entitled to pursue, yet the action is now barred by the act 1617, c. 12, the burgh of Perth having been in possession of the subjects for upwards of forty years without interruption.

3. Supposing the action to be still competent, the appellants have produced title-deeds prior to their possession.

4. At all events, the appellants are exonerated by

the *bona fide* nature of their possession from the action for profits for forty years past.

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MAGISTRATES
OF PERTH
&
THE
PRESBYTERY.

Pleaded for the Respondents :—1. The trustees are, by the tenour of the grant, made accountable to the superintendent; and by act of Parliament the bishop and ordinaries have the control of pious donations within their bounds. All offices in the church of Scotland superior to that of a presbytery being abolished, the presbyteries are come in place of the bishops and superintendents.

2. Actions prescribe by the act 1617, only where the possession for forty years has been upon a charter and seisin, or, in the case of an heir, upon a continued tract of seisins flowing upon retours or precepts of *clare constat*.

3. The appellants produce no title. The lands in question are not included in the charter of Rob. II. founded on, because at its date, and until the Reformation, they belonged to the Charter-house in Perth.

4. The appellants, having possessed without any title, are liable for all bygone rents and profits.

After hearing counsel, “it is ordered and adjudged, &c. that the appeal be dismissed; and that the several interlocutors therein complained of be, and the same are hereby affirmed.”

Judgment
March 6,
1730.

For the Appellants, *Dun. Forbes, C. Talbot, Ro. Dundas.*

For the Respondents, *P. Yorke, Ch. Areskine, Ja. Graham.*

1730.

EARL OF
ABERDEEN

v.

EARL OF
MARCH AND
OTHERS.WILLIAM EARL of Aberdeen, *Appellant*;

WILLIAM EARL of March; ALI-	} <i>Respondents.</i>
SON CALLENDER, Widow; JAMES	
HALYBURTON, and ANDREW DUN-	
NET, - - - -	

9th April, 1730.

ASSIGNATION — What sufficient intimation.

No. 10. Sir James Hamilton and others purchased the forfeited estate of Keir, and held it in trust for behoof of John Stirling, the son of the attainted person. These trustees appointed Mr. Hamilton of Dachmount to the general charge of the property; in consequence of which, he carried on the whole management, and kept a record of his transactions, which was patent both to the trustees and to Mr. Stirling.

In 1721, they granted a bond for L.1000 sterling to James Lowis of Merchiestoun, and upon his death, John Lowis, his executor, having called up the money, it was advanced by the appellant, who thereupon received an assignation to the bond. Of this transaction Mr. Hamilton was made aware, and a note of it was entered by him in his book of accounts.

In 1727, Lowis failed, upon which the respondents, having claims against him, arrested this sum

of L.1000 in the hands of the trustees, who thereafter raised a multiplepoinding, in which both the appellant and the respondents were called as defenders. The respondents insisted that the assignation was of no effect, sufficient intimation of it not having been given to the debtors. It was found "that the notification made to Mr. Hamilton and entered in his book, is not equivalent to an intimation to the debtors, and therefore pre-fer the arresters." This judgment was adhered to.

1730:
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ABERDEEN
V.
EARL OF
MARCHE AND
OTHERS.

July 11,
1728.

July 26.

An offer was then made to prove other circumstances tantamount to a formal intimation; and the proof being allowed, the following facts were established. It appeared that the appellant's purpose of purchasing the bond had been signified by Lewis's agent to Mr. Hamilton; that Mr. Hamilton had assented on the part of the trustees; that when the assignment was completed, Mr. Hamilton was in like manner informed by Lewis's agent, and requested to pay to Mr. Lewis the arrears of interest up to the date of the assignment, which he did, and entered the payment in his cash book, with a memorandum, that the debt was from thenceforward conveyed to the appellant; that he afterwards gave notice of what was contained in this memorandum to Mr. Stirling; but that the assignation was not shown or read to Mr. Stirling.

Upon advising these depositions and a hearing in presence, the Lords "found the qualifications of the notifications made to Dachmount, and marked in his book, relevant and proven, to be equivalent to an intimation to the debtors; and

July 2, 1729.

1730.

**EARL OF
ABERDEEN
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MARCH AND
OTHERS.**

“therefore preferred the Earl of Aberdeen, the assignee.”

July 30, 1729.

Entered
January 14,
1730.

The respondents petitioned against this interlocutor, arguing, that by the law of Scotland, intimation in presence of a notary is required for perfecting the right of an assignee, and that private notice is never equivalent to an intimation. The Lords, by the narrowest majority, “found the qualifications of the notification made to Mr. Hamilton, and marked in his book, and other qualifications pleaded upon by the assignee, were not equivalent to an intimation to the debtors, and therefore preferred the creditors against resters.”

The appeal was brought from the interlocutor of the 30th July, 1729, and prays that the same may be reversed, and that the decree of the 2d of the said July may be affirmed.”

Pleaded for the Appellant:—There is no law which requires the assignment of a bond to be published by a notarial instrument. It has been always held that intimation by such overt acts, as must remove all suspicion of fraud or collusion, is sufficient to complete the assignee's right.

Pleaded for the Respondents:—The want of a notarial intimation cannot be supplied by the private knowledge of the debtor, far less of the debtor's agent. [Sir G. Mackenzie, Tit. *Assignations*. Stair, B. III. t. 1. § 7.] The cases in which other acts have been held equivalent to such an intimation are quite different from the present, in which the appellant pleads no more than a private notice to an agent.

After hearing counsel, "it is ordered and adjudged, that the said sentence or decree of the 30th July, 1729, be and is hereby reversed, and that the said decree of the 2d of the same month be, and is hereby revived and affirmed; and it is hereby further ordered, that the L.1000 secured by the bond in the appeal mentioned, and interest for the same from Martinmas 1725, be paid to the appellant."

1730.

GORDON

v.

CRAUFORD.

Judgment

April 9, 1730.

For the Appellant, *C. Talbot*, and *Ro. Dundas*.
For the Respondents, *P. Yorke*, *D. Forbes*,
C. Areskine.

JAMES GORDON of Craigland, *Appellant*;
PATRICK CRAUFORD, the Father, }
and PATRICK CRAUFORD, the Son, } *Respondents*.

28th April, 1730.

FRAUD.—Fraud and circumvention inferred from the distressed state of the granter of a disposition, the deceitful terms of the writings, and the great inequality of the bargain.

PATRICK CRAUFORD was, in virtue of certain decreets of adjudication, in possession of the estate of Craigland, (worth L.220 per annum,) the property of James Gordon (Appellant) who was in very distressed circumstances, and had been for several years a prisoner for debt. Taking advantage of

No. 11.

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GORDON
v.
CRAUFORD
May 13, 1734.

his necessitous situation, Crauford obtained from him, in consideration of some temporary relief, a disposition to the estate on very disadvantageous terms. The disposition recited, "that the same " was granted for certain sums of money now and " of before advanced, and for certain other onerous " causes and weighty considerations equivalent to " the true worth and value of the premises." At the same time no more (it was admitted) than L.120 had been paid, and for this Gordon's bond was taken.

A back bond was granted by Crauford narrating the disposition, and declaring that in consideration thereof, he should pay to Gordon an annuity of L.50 per annum for three years ; and that so soon as he had discharged all the incumbrances on the estate, but not sooner, a liferent alimentary provision, to be settled by arbiters, should be paid to Gordon. The benefit of all eases, or deductions to be obtained from creditors, was to belong to Crauford, and not to Gordon. By a subsequent letter, Crauford promised to allow at the rate of sixteen years purchase for the lands, from which were to be deducted the debts, and all charges incident to the sale and management of the property and to the payment of the debts. The current value of such estates at that period was alleged to be thirty years purchase of the free rental.

Gordon having, by the assistance of other friends, been released from prison, brought an action of reduction against Crauford and his son, (the estate having been conveyed to him by his father) for setting aside the above disposition, on the ground of

fraud and circumvention, he repaying with interest what money he had actually received in consideration thereof. In support of this action, he argued on the several circumstances inferring fraud, obviously arising from his situation at the time of the transaction, and from the nature of the securities themselves pretended to be given to him in consideration of an absolute conveyance of his estate.

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v.
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The Lord Ordinary "having considered the former procedure, with the condescendence of the reasons of reduction given in for the pursuer, and the defender's answer thereto, together with the declaration emitted by Mr. Hamilton of Olivestob, with consent of both parties, with the two missive letters relative thereto, and back bond granted by Mr. Crauford to Mr. Gordon, and other writs in process, finds that there is no sufficient evidence adduced, that Mr. Crauford, by any unwarrantable means induced Mr. Gordon to dispoise to him the estate of Craigland, but that the same came voluntarily on Mr. Gordon's part; and therefore finds that the said disposition ought to subsist, and repels the reasons of reduction thereof libelled and contained in the memorial of condescendence given in for the appellant, and assoilzies; but finds that Mr. Crauford is bound to communicate to Mr. Gordon the benefit of any eases or compositions he has made or shall make with the creditors of Craigland, and declares that he will hear parties' procurators further in relation to the particulars performable by Mr. Crauford in the execution of his parts of the agreement; and that for rectifying any

November 6,
1729.

1730.

 GORDON
 v.
 CRAUFORD.
 January 14,
 1730.

“ grounds of complaint that may have been in-
 “ cident in the execution thereof, and for making
 “ the said execution more ready and effectual.”

Upon a petition to the Inner House, the follow-
 ing interlocutor was pronounced: “ Find that
 “ there is no sufficient evidence adduced, that Mr.
 “ Crauford by any unwarrantable means induced
 “ Mr. Gordon to dispoise to him the estate of Craig-
 “ land; but that the same came voluntarily on Mr.
 “ Gordon’s part; find that the said disposition
 “ ought to subsist; and repel the reasons of re-
 “ duction libelled and proponed there against.”

Entered
 January 28,
 1730.

The appeal was brought from these two interlo-
 cutors of the 6th November, 1729, and the 14th
 January, 1730.

The argument resolved into discussion upon the
 special facts of the case.

Judgment
 April 28,
 1730.

After hearing counsel, “ it is ordered and ad-
 “ judged that the said interlocutors complained of
 “ be and are hereby reversed; and the deed of
 “ disposition in question be reduced; and it is
 “ hereby further ordered, that the lands contained
 “ in the said disposition do stand charged to the
 “ respondent, Patrick Crauford, the father, for the
 “ money by him paid for the said estate, or for dis-
 “ encumbering the same, together with interest for
 “ such money.”

For Appellant, *P. Yorke, Dnn. Forbes, Ro.
 Dundas.*

For Respondents, *C. Talbot, C. Areskine, Will.
 Hamilton.*

1731.

CARRE
v.
HALDANE.

JOHN CARRE of Cavers, Esq.—*Appellant*.
JOHN HALDANE of Lanark, Esq.—*Respondent*.

15th March, 1731.

WRIT.—Act 1681, c. 5. What an insufficient designation of a witness to a bond.

[Bruce, p. 1. Mor. Dict. p. 16924.]

JAMES LAW executed a bond for L.500 Scots in favour of John Carre, the appellant. After Law's death, Carre obtained a decree of adjudication upon the bond against certain lands, in which he had been infeft, and upon this adjudication raised an action of mails and duties against the tenants. No. 12.
1683.

Posterior to the adjudication, James Law (son and heir to the granter of the bond) sold and disposed the lands in question in favour of John Haldane, the respondent, who thereupon brought an action of mails and duties against the tenants, and likewise a reduction against the appellant, concluding to have his bond and the adjudication following on it set aside, on the ground (among other reasons) that the subscribing witnesses were not designed in terms of the act 1681, c. 5. The designation was as follows: "Before these witnesses, "Gilbert Ellet, inserter of the sum, and Archibald "Nilson, serviter to the laird of Cavers."

The Lord Ordinary, by interlocutor of this date, November 10, reduced the bond and adjudication, and ordered¹⁷¹⁴

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 CARRE
 v.
 HALDANE.
 Entered
 January 28,
 1730.

the tenants to pay the rents, &c. to the respondent. This judgment was three times brought under review of the whole Court, and as often adhered to.

The appeal was brought from the interlocutors “of the 10th and 23d November, and 7th and 16th “December, 1714.”

Pleaded for the Appellant:—It being offered to be proved that both witnesses were servants of the laird of Cavers, the single designation of “servitor” is evidently applicable to both. It is obvious that the writer of the deed so intended it, and at all events the error, which consists only of the omission of the letter *s* at the end of the word “servitor,” can amount to no more than *vitium scriptoris*.

The bond having been granted for a valuable consideration, viz. money actually lent, and the question being with a purchaser who acquired the lands under burden of this debt, the act ought to be construed as favourably as possible. The only object of the act was to prevent frauds in the execution of deeds, and there is here not the least suspicion or allegation of any fraud.

Pleaded for the Respondent:—The witnesses are not designed in terms of the statute. Its words are imperative, and expressly exclude all proof to supply a defective designation.

After hearing counsel, “it is ordered and adjudged, &c. that the appeal be dismissed, and “that the said interlocutory sentence or decree “made by the said Lord Ordinary, and the several “interlocutors of the said Lords of Session in af-

Judgment
 March 16,
 1731.

"firmance thereof be, and the same are hereby affirmed."

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BORTHWICK
v.
BORTHWICK.

For Appellant, *C. Talbot* and *J. Grahame*.

For Respondent, *Dun. Forbes* and *Will. Hamilton*.

LILIAS BORTHWICK, *Appellant* ;
JOHN BORTHWICK of Cruikston, Esq. *Respondent*.

19th March, 1731.

TAILZIE.—Act 1685, c. 22. An entail, containing prohibitory and irritant clauses *de non contrahendo debitum*, having been executed before the date of the act 1685, but not followed by infeftment until after it, and not recorded in terms of that act,—found not to debar the heir from granting bonds of provision to his younger children.

[Fol. Dict. II. p. 434. Mor. Dict. p. 15556.]

By an entail of the lands of Overshiels, bearing date the 23d May, 1685, the heirs are prohibited under irritant and resolute clauses, "to contract any debts, or yet to do any deed whereby the same may be apprised or evicted or adjudged from them." There is no mention in the deed of any power of making provisions for wives or children. The deed which contained a clause dispensing with delivery, remained in the granter's custody until his death in 1687. It was registered in the books of council and session on the 7th January in that year, but was not recorded in the Register of Tailzies. No. 13.

1731. John Borthwick (the appellant's father) having
 BORTHWICK succeeded as heir under this entail, granted a bond
 v. of provision, whereby he bound himself, his heirs
 BORTHWICK. of entail and successors in the said estate, to pay
 7000 merks to his daughter Lilius. He was suc-
 ceeded by the respondent.

The appellant brought an action to have it found that she was entitled to the above portion, and that it was a burden on the estate of Overshiels. She pleaded, that by the general prohibition upon the heirs of entail to contract debt, they are not restrained from giving reasonable provisions to their children; that this was no entail before the act of Parliament 1685, because not completed by infeftment before that period, and therefore was undoubtedly liable to the regulations of that act, and could not be allowed unless recorded in terms of it; that supposing it had really been an entail before the date of the act, yet until it was recorded, the prohibitory and irritant clauses thereof could not be effectual.

It was answered, that the provisions and prohibitions of the entail must be effectual against the appellant, and all the other creditors of the granter of the bond of provision and his heirs of entail, because although the entail was not recorded in terms of the act 1685, yet being four days prior in date to that act, it did not fall within its effect.

February 11, 1730. The case being reported by the Lord Ordinary, the Court found "that the deed of entail is to
 "be considered as made before the act of Parlia-
 "ment 1685, and that the said deed of entail dis-
 "ables the heir of entail from contracting debts,
 "and granting bonds of provision to their child-

"ren;" and remitted to the Lord Ordinary to proceed accordingly, who assoilzied the defender, and decerned.

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BORTHWICK

v.

BORTHWICK.

The appeal was brought from these interlocutors of the 11th and 21st February, 1730.

Entered
March 5,
1730.

*Pleaded for the Appellant:—*1. As there is a natural obligation on parents to make provision for their children, a reasonable provision made in execution of that obligation, cannot properly be called contracting debt, and consequently does not fall under the prohibition, which is intended only to hinder incurring debt unnecessarily; and this the rather that when it is intended to limit heirs of entail, in respect to their power of providing wives or children, particular clauses are usually inserted, disabling them to give larger provisions than are in the deed of entail specified. There being no such clause in the entail in question, it seems a necessary inference that the granter intended to leave his successors at liberty in this respect.

2. The entail not having been registered in terms of the act 1685, the prohibitions contained in it, which otherwise might affect the appellant, must fall to the ground. For even admitting that this statute does not affect entails that were perfected before the date of it, yet the deed in question, though signed four days before the date of the statute, was not perfected by infeftment, so as to make the conditions of it conditions of the fee until many years afterwards; it having remained in the granter's hands till his death, subject to a power of alteration, and also capable of being made effectual by registration. It cannot therefore be said that this deed constituted an entail at the date of the act of par-

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liament ; and if, after that statute, the granter had intended to carry on his design to perfection, he ought to have registered it.

Pleaded for the Respondent.:—1. The prohibitory clauses in the deed are general against all debt and deeds, by which the lands entailed, or any part thereof, could be evicted, and consequently comprehend bonds of provision to children as well as other debts ; and however it might be a duty for the appellant's father to provide for her, yet that provision ought to have been out of his own estate only. He had no power over the estate in question to charge it with debts ; and the respondent does not claim under him, but by a title paramount to him.

2. The entail having been made four days before the date of the statute, (which regulates entails *thereafter* to be made,) is as much prior thereto, as if it had been made any number of days or years before, that act having no retrospect. If an act were to be carried back one day, it would be impossible to fix the period of its commencement. Besides, no act of parliament is by the law of Scotland to take place till forty days after its date ; and it cannot be doubted, that entails made before that act were good and effectual, though not registered.

Every person dealing with the possessors of the estate, had sufficient notice of the restrictions under which they lay. The entail was recorded in the books of Council and Session in 1687. A charter was granted of the lands and sasine taken upon it, in which were contained *verbatim* the several clauses against contracting debts ; which sasine was likewise duly registered.

After hearing counsel, "it is ordered and adjudged, &c. that the interlocutors complained of be reversed; and it is hereby declared, that the deed of entail made by Mr. John Borthwick, the 23d May, 1785, did not disable the heir of entail from granting the bond of provision in the pleadings mentioned to the appellant; and that she is therefore entitled to the sum of L. 388, 17s. with interest, from the first term of Whitsunday or Martinmas, after the death of her father; and it is hereby further ordered that the said sum with the interest thereof, be paid to the appellant accordingly."

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BORTHWICK.
Judgment
March 19,
1731.

For Appellant, *Dun. Forbes*, and *C. Talbot*.

For Respondent, *P. Yorke*, and *Will. Hamilton*.

This reversal is not noticed in the reports. It is mentioned by Erskine, (B. III. t. 8, § 30.) where he explains the doctrine involved in the judgment of the Court of Session. As, however, that judgment proceeded on the first branch of the argument given above, the decision of the House of Lords, (if it is rightly supposed to have proceeded only on the second branch of the argument,) would appear not to have the effect of interfering with that doctrine.

In the printed *Cases* reference is made to a previous decision of the Court of Session, in a question arising out of the same entail; (Jean Cant, relict of Borthwick of Hartside v. Borthwick of Crookstone; December 27, 1726. Rem. Dec. No. 90. Mor. Dict. p. 15554.) in which, being a claim by a widow (mother of the appellant) for a life-rent provision made to her by her husband, the heir of entail, "the Lords found that the bond of annuity is comprehended under the prohibitive clause in the tailzie, but sustained the said bond, in so far as the same can be supported by a terce." The report further bears, that "betwixt these parties the question occurred—If tailzies, made before the act 1685, fall to be regulated thereby, so as to be ineffectual against creditors, if not registered." "The Lords sustained the tailzie, though not recorded conform to the act of parliament 1685, in respect the same was granted before the act." This case was not carried to the House of Lords; otherwise upon the principles which are supposed to have regulated the decision in the present appeal, the latter judgment would have been reversed.

1731.

CUTLAR

v.

MAXWELL.

ARCHIBALD CUTLAR of OROLANDS, *Appellant*;
ALEX. MAXWELL of NEULAW *et alii*, *Respondents*.

30th March, 1731.

PROOF—PRESUMPTION—Circumstances from which it was held, that the payment of a debt had been made by a cautioner, and not by the principal debtor.

- No. 14. THIS was a question between the representatives of a principal debtor and those of a cautioner. Bonds had been granted by the cautioner for the amount of the debt; and on the other hand, the principal debtor executed an obligation, bearing that the debt for which these bonds had been granted, was a debt due by him, and obliging himself to pay it with interest.

1660.

1665.

1669.

The interest was uniformly paid by the principal debtor, (unless during six months) down to the year 1677, at which date the principal sum was paid to the creditor, who granted a receipt and discharge for the same in favour of the cautioner.

In 1710, Cutlar, the heir of the cautioner, raised an action against Maxwell and others, (the representatives of the principal debtor,) for payment of the debt, and the question came to be, by whom was the debt to be presumed to have been paid?

Cutlar's case rested simply on the discharge by the creditor, as evidence that his father had paid the debt; on the other hand, the defenders founded on a variety of circumstances, from which they

argued the presumption that the debt had been paid by their father, the principal debtor.

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Among other things, they founded upon the fact, that the principal bond for the debt had been found cancelled in the repositories of their father. They likewise founded upon the length of time which had elapsed without any claim of relief being made, both from the date of the alleged payment until the death of the cautioner, (ten years,) and also from that event until the raising of the present action; further, on the fact of the principal debtor having paid the interest.

The Lords found “the presumptions pleaded July 8, 1727.
 “for the children of Samuel Maxwell of Newlaw,
 “not sufficient to instruct that the contents of the
 “bond were paid by the effects of Newlaw, except
 “in as far as the receipts of annual rent bear ex-
 “pressly to be received from him.”

This interlocutor was adhered to. Upon advising Feb. 9, 1728.
 a petition and answers, however, their Lordships found the presumptions pleaded for Newlaw’s children, especially the fact of the retired bond having been found in his repositories, sufficient to instruct that the contents of the bond had been paid by the effects of Newlaw. A petition against this Feb. 4, 1729.
 interlocutor was refused.

The appeal was brought from the interlocutors Entered
 of the 9th Feb. 1728, and the 4th Feb. 1729. Jan. 28, 1730.

After hearing counsel, “it is ordered and ad- Judgment
 “judged, &c. that the interlocutor complained of March 30,
 “be reversed; and that the interlocutory sentence 1731.
 “of the Lords of Session, pronounced the 8th
 “July 1727, and the interlocutors of the same

1731. "Lords, of the 28th November and 29th of De-
 CUTLAR "cember following, adhering to the said former
 v. "interlocutory sentence, be revived and affirmed."
 MAXWELL.

For Appellants, *Dun. Forbes* and *C. Talbot*.

For Respondents, *P. Yorke* and *A. Hume Campbell*.

SIR WILLIAM GORDON, BART. *Appellant*;
 LUDOVICK GORDON, Merchant in } *Respondent*.
 Elgin, - - - - -

5th April, 1731.

PROCESS—RES JUDICATA—A party having been prosecuted before the Court of Justiciary, on a criminal charge, concluding likewise for damages and expenses, and acquitted,—found to be still subject to a civil action.

OATH OF PARTY—Found to be discretionary with the Court whether or not to grant commission for taking the oath of a party who was out of Scotland at the time.

- No. 15. SIR WILLIAM GORDON was prosecuted before the Court of Justiciary at the instance of Ludovick Gordon, (with concurrence of the Lord Advocate) on a charge of having assaulted and violently taken from him, two bills for the several sums of L.68 and L.25, due to him by Sir William, and certain other small articles. The libel also contained a conclusion for the private interest of damages and expenses, to which, upon going to trial, the indictment was restricted. Sir William was acquitted.

Thereafter Ludovick raised an action against him in the Court of Session, for restitution of the above property, and likewise for payment of L.100 in name of damages and expenses. Sir William having appeared by counsel and denied the charge, the pursuer offered to prove the same by reference to his oath. Sir William, being in London at the time, prayed that a commission might be granted for taking his oath there, on the ground of extreme inconvenience and detriment to his private affairs, without which he could not then come to Scotland. This being twice refused, he again prayed that a commission might be granted, and further stated in defence, that a criminal action having been brought against him at the pursuer's instance, not only for punishing his alleged violence, but likewise for compelling him to pay the pursuer's damages, from which he had been fully acquitted, no new suit either civil or criminal, could competently be raised against him on the same point.

The pursuer having insisted on his being examined in presence of the Court, their Lordships "refused to grant commission, and held the de- Feb. 26, 1739.
"fender as confessed," &c. Several petitions against this judgment were refused, and of this date the Lords "ordained the pursuer to give his Feb. 11, 1730.
"oath in supplement." The pursuer's oath being accordingly taken, the Court found "it proven, "that the defender seized upon and took from "Ludovick Gordon, the pursuer, in November "1718, two bills drawn by him upon and accepted "by the defender, for L.93 sterling, and find the

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GORDON
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“defender liable for the same, with interest from that time; and find it also proven by the said oath, that the defender is justly owing L.6 sterling, as value of herring barrels, and ordain the said Ludovick Gordon to give in a condescendence of the value of his jockey coat, sword, and switch, and of the expense of suit, and of the expense of the said Ludovick’s journeys to Edinburgh.” These articles were afterwards taxed to L.800 Scots.

Entered
March 6,
1730.

The appeal was brought from the interlocutors of the 26th February, 13th June, 2d July, 21st November, 1729, and the 11th, 12th, 17th, and days of February, 1730.

Pleaded for the Appellant:—1. The facts charged as the foundation of the suit, are utterly untrue, and neither are nor can be proved by any legal evidence.

2. The appellant having been tried for the same facts before a supreme and competent court, and acquitted even from the demand of damages and expenses, no new action can be brought against him. For if judgment had been given against him in the former action, which was competent for recovery of the articles now claimed, and of damages, no civil action would thereafter have remained; whence it is plain, that not only the *vindicta criminalis*, but the *interesse civile* of the respondent, was then brought into judgment. Judgment having been given, it became *res judicata*, and the same thing could not again be brought forward under any form of action whatsoever; for it would be most unreasonable that a party should be concluded by

a judgment against him, and yet that a sentence acquitting him should profit him nothing, but leave him still subject to a new action.

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3. The appellant, having been necessarily detained in London by important private affairs, ought, according to the common rules of justice and the practice in like cases, to have been allowed a commission for taking his oath, which he was, and still is ready to emit, although he apprehends that he cannot now be compelled to do it, for the respondent having in his former action made choice of his manner of proof, viz. by witnesses, and suffered the case to go to judgment upon their evidence, no other proof should be allowed him. There is no instance where a commission, in the case of a person who was necessarily out of the jurisdiction of the court, was refused.

4. The allowing the respondent to prove his claim by his own oath, after he had relied on the appellant's oath, in place of all further proof, has no foundation in law, and is quite without precedent.

*Pleaded for the Respondent:—*1. The oath of the party is legal evidence, and if he declines to give his oath, the fact is justly considered as admitted.

2. Although there had been no foundation for the charge of violence, and breach of the peace, on which the criminal action was raised, yet the bills accepted by the appellant, might still have been due; and if, from his oath, which, by the law of Scotland, is the most decisive mean of proof in civil causes, for restitution or reparation, it could

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be established, that the appellant truly owed that money, or that the articles were in his possession, the acquittal from the criminal complaint could be no reason for his not being compelled to pay the civil debt.

The appellant having once consented to be examined, could not afterwards plead the former suit as a bar to this action.

3. It is discretionary in the court, by way of indulgence, and upon cause shown, to grant a commission for taking the oaths of a party; and as in the usual case he is examined by one or all of the judges in the presence of the counsel and agents, who have a liberty of cross-examining, it was a much more effectual way to find out the truth, to have him examined in that way, than upon a commission, where the interrogatories must be previously settled, and the examination confined to them. It may be necessary, also, to confront the party with other persons who know any thing of the subject matter.

4. The appellant having been indulged from time to time, for above two years, with an opportunity to give his oath, and neglected it, the charge was taken *pro confesso*, but the court properly tendered the oath to the respondent for their further satisfaction.

Judgment

April 5, 1731.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the several interlocutors therein complained of be, and the same are hereby affirmed."

For Appellant, *C. Talbot, Will. Hamilton*, and
A. Hume Campbell.

For Respondent, *P. Yorke*, and *Dun. Forbes*.

1732.

NEILSON

v.

MURRAY.

JOHN NEILSON of Chappel, and } *Appellants*;
 JAMES LANRICK of Ladylands, }
 JOHN MURRAY, *et alii*, *Respondents*.

14th March, 1732.

FIAR—A wife having in her marriage contract conveyed her estate in favour of her husband and herself in conjunct fee and liferent, and the survivor of them, and the heirs of the marriage; the fee was found to be in the husband, although the wife survived, and there were no heirs of the marriage entitled to succeed under the contract.

SERVICE OF HEIRS—PAPIST—A general service as nearest heir Protestant to the husband, found to be a sufficient title to carry the fee settled in the marriage contract, the children of the marriage being Papists, and therefore legally disqualified from succeeding.

THE lands of Conheath descended to two heirs portioners, of whom Elizabeth Maxwell, a papist, had by her first marriage two sons, John Murray (the respondent) who was a protestant, and James a papist. She entered into a second marriage with Gilbert M'Cartney, and by the marriage contract she conveyed her half of the said estate (although she had neither been infest herself, nor served heir to her father,) "to the said M'Cartney and herself, "in conjunct fee and liferent, and the survivor of "them, and the heirs of their bodies, begotten of "the future marriage, which failing"—then fol-

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v.
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lowed a blank which was never filled up.* She survived M'Cartney, and had issue of the marriage, a son William, and a daughter, who were both papists.

Thereafter she made a conveyance of the estate in favour of James her second son, which she prevailed on her son William M'Cartney to make effectual, by granting a disposition of all right which he might have under his father's marriage contract.

John Murray, having served heir to his grandfather, raised an action of reduction for setting aside this disposition, on the ground that it was null and void, by force of the acts, 1695, c. 26, and 1700, c. 3, William the granter of it being a papist.

The Lords repelled an objection of *jus tertii* pleaded against the pursuer, and found the grounds of reduction relevant and proven, and reduced accordingly. This judgment was affirmed upon appeal in the House of Lords.†

Upon petitioning to have the judgment of the House of Lords applied, a new title was set up by the appellants, who now founded on a conveyance by Elizabeth Maxwell in their favour, of several apprisings affecting the estate. Various proceedings ensued, in which objections were stated to the validity of the apprisings, and of these conveyances. It seems only necessary to notice the following points.

* The terms of the deed do not occur verbatim in the appeal cases. They are given above as quoted by Mr. Robertson in his report of the first branch of the case, referred to *infra*.

† Vide Robertson's Appeal Cases, No. 125.

The respondent pleaded that by the marriage settlement betwixt Elizabeth Maxwell and Gilbert M'Cartney, the fee of the estate was vested in the husband, upon whose death it might have descended to the heirs of the marriage, had they not been incapable of inheriting, and that therefore the right of succession to the estate devolved upon his next heir, Agnes, (a daughter by a previous marriage,) who had been served nearest protestant heir to him;—that the respondent had obtained a conveyance from her of all right which her father had acquired by his marriage contract, in virtue of which conveyance he was entitled to the estate.

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v.
MURRAY.

To this the appellants answered, that Agnes M'Cartney, not being the issue of her father's second marriage, could have no claim to the estate settled in the contract of marriage. The estate having been disposed to Gilbert M'Cartney in conjunct fee and liferent with Elizabeth herself, and longest liver of them, and Elizabeth having survived her husband, the fee necessarily remained in her who was yet alive, and must (had she not sold the estate) have descended to the heir of the marriage, not as heir of provision to the father, but as heir of provision to her.

But even supposing the fee to have been in Gilbert, so that upon the failure or incapacity of the issue of the marriage, it would have devolved upon his next heir, still Agnes could not carry a right to it by a general service as heir of line to her father, but ought to have been served heir of provision under the marriage contract; in which case the death or incapacity of the children of the mar-

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riage must have been proved, and the contract itself produced before the inquest, and evidence given that she was the next heir entitled to be served under it ; but nothing of all this was done; and therefore her service as heir in general of line to her father could not be effectual to carry a right to the estate ; so that never having made up a sufficient title herself, the conveyance by her to the respondent was void.

July 20, 1728. The court found “ that the general service is a “ good title ; the pursuer (respondent) proving “ that the children of Gilbert M‘Cartney’s second “ marriage were reputed papists, and bred in po- “ pish families.”

In a petition against this judgment, it was further stated, that the conveyance by Elizabeth Maxwell in favour of her second husband ought to have no effect, inasmuch as the onerous cause in consideration of which it had been granted, viz. a jointure out of his estate, had never been enjoyed by her. The court “ repelled the objection, that “ the onerous cause of the lands being disposed “ by the said Elizabeth Maxwell, was a jointure “ she never enjoyed,—and found that M‘Cartney, “ the husband, was *fiar*.”

Entered Feb.
18, 1731.

The appeal was brought from several interlocutors of the 28th June, 20th July, 1728, the day of January, 18th and 22d February, 1729, 28th July, and day of November, 1730, and 5th February, 1731.

Judgment
March 14,
1732.

After hearing counsel, “ it is ordered and ad- “ judged, &c. that the appeal be dismissed, and

“that the several interlocutory sentences therein
“complained of be affirmed.”

1732.

HAMILTON

v.

THE DUTCH
EAST INDIA
COMPANY, &c.

For Appellants, *P. Yorke, Dun. Forbes, R.
Dundas, Ch. Areskine.*

For Respondents, *C. Talbot, and Will. Hamil-
ton.*

CAPTAIN ALEXANDER HAMILTON, *Appellant*;
The LORDS DIRECTORS of the
DUTCH EAST INDIA COMPANY, }
and WILLIAM DRUMMOND, their } *Respondents.*
Factor, - - - - -

4th April, 1732.

FOREIGN—PROCESS—RES JUDICATA—The final sentence of a
competent court in a foreign state, forms a sufficient defence,
exceptione rei judicate.

[Fol. Dict. I. p. 323. Mor. Dict. p. 4548.]

A VESSEL, of which the appellant was a proprietor, No. 17.
was seized by the Dutch East India Company, on
a charge of contraband trade, and condemned in
the court of Malacca. An appeal was taken to 1711.
the High Court of Batavia, by which the sentence
was affirmed.

Some years afterwards part of the cargo of a 1728.
Dutch East India ship, which was wrecked on the

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coast of Scotland, having been brought into the Court of Admiralty, the appellant arrested the same in the hands of the Court for satisfaction of the damage which he alleged he had suffered by the illegality of the above confiscation. It was objected to this claim; 1st, That the Court of Admiralty had no jurisdiction over the respondents; 2d, That the competent Courts had decided the confiscation to be legal, and that their sentence must be held *res judicata*.

Jan. 23, 1730. The objection to the jurisdiction was repelled in the Court of Admiralty, and does not appear to have been pressed in the appeal. The defence of *res judicata* was likewise repelled by the judge admiral, and a proof allowed to the appellant of certain circumstances relating to the confiscation of his vessel. This judgment was adhered to.

July 24, 1731. The case was brought under review of the Court of Session by a bill of suspension and action of reduction, and upon advising informations and a hearing in presence, the Lords "sustained the reason of suspension of *res judicata*, and repelled the objection of incompetency and iniquity." This judgment was adhered to.

Entered Jan. 25, 1732. The appeal was brought from the interlocutors of the 24th and 27th July, and 23d December, 1732.

Pleaded for the Appellant:—No sentence pronounced in one country can be *res judicata* in another, or have any authoritative force; for it is the power of the judge that gives the force of *res judicata* to any decree; but that power or jurisdiction cannot operate beyond his territory, where

the sovereign, who is the fountain of his jurisdiction, has himself no authority; the effect cannot go further than the cause.

It would be of the most dangerous consequence, if it were in the power of the subjects of any other nation, violently to seize the ships of the subjects of Great Britain, without any just cause, and then to shelter themselves under the pretence of *res judicata* by a sentence, pronounced by judges of their own creating, without being able in the least to support the justice of the sentence.

The respondents ought to show the justice of the sentence, for as the foreign Court had no jurisdiction over a British subject, unless he had been guilty of some crime, whereby the ship and cargo were liable to be forfeited; so, in order to found that jurisdiction, they must prove the crime; for if there was no crime, then the Court had no jurisdiction; and if there was no jurisdiction, there can be no plea of *res judicata*.

*Pleaded for the Respondents:—*The *exceptio rei judicate* is absolute and perpetual, according to the uniform doctrine of all lawyers, and is universally allowed in all countries, and by the law of nations to be available in all courts. It is indispensably necessary that this should be held a good plea in all nations, to prevent the innumerable inconveniences that would follow, if a party who has obtained a final sentence in one state, should be liable at the humour of his opponent, to go to a new trial in another, and consequently in *every other* state, where he or any of his effects should happen to be found, and where it may be utterly

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 COMPANY, &c.

impossible for him to produce the evidence which he previously had to support his case.

Where a sentence in one state has been pronounced, but not executed, and the party in whose favour it is, shall apply to a court in another state, to carry that sentence into execution, there the judge may and ought to inquire and be satisfied as to the justice of the sentence, before he gives his aid to put it in execution within his jurisdiction ; but when a sentence has been fully executed, there is no need of preserving the vouchers or evidence, which were the foundation of that sentence ; for when a matter has been judicially determined, it is to be presumed it was rightly determined, according to the established maxim, *res judicata pro veritate habetur*.

Judgment
 April 4, 1732.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the several interlocutors therein complained of be, and the same are hereby affirmed."

For Appellant, *C. Talbot, Ro. Dundas, Will. Hamilton.*

For Respondents, *P. Yorke, Dun. Forbes.*

1732.

FERGUSSON

v.

MAITLAND,
&c.

WILLIAM FERGUSSON, Esq. of Auch- } *Appellant* ;
inblane,

MR. WILLIAM MAITLAND, Minis- } *Respondents*.
ter, JAMES ROB, Merchant in
Edinburgh, and ISABEL, his Wife,

5th April, 1732.

FRAUD—A deed reduced upon the head of fraud and circum-
vention, which were chiefly inferred from the facility of the
granter, in conjunction with the very disadvantageous terms
of the transaction.

COSTS—L.60 given to respondents.

[Fol. Dict. Vol. I. p. 337. Mor. Dict. p. 4956.]

FERGUSSON obtained decree against John Col- No. 18.
ville, surgeon in Mauchline, as cautioner for a debt
of 2000 merks. Upon this decree Colville was
charged on letters of horning, and a caption exe-
cuted against him. Thereafter, he assigned over
to Fergusson, several heritable debts, amounting
in all to 4000 merks, (which, however, according
to the statement of Fergusson, were very much
incumbered with prior claims and arrestments.)
Fergusson gave a back bond, declaring these assig-
nations to be only in security of the debt sued on.

He next arrested, in the hands of Maitland, (the
respondent) some funds belonging to Colville, and
raised an action of forthcoming, in which, by a
decree arbitral, Maitland was directed to pay to

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 FERGUSSON
 v.
 MAITLAND,
 &c.
 1725.

him, 1700 merks, of which 1000 were shortly afterwards paid.

Of this date, he obtained from Colville an absolute disposition of the above debts, &c. and at the same time he executed a back bond, declaring that this disposition was only granted in security of a debt of L.236, 7s. 5d. sterling, due by Colville to him, for which sum Colville also granted his bond.

Afterwards Colville was reduced to great straits for the means of subsistence, of which Fergusson took advantage to obtain from him a discharge of the above-mentioned back bond; by which deed he discharged all claims which he might have against Fergusson, and further bound and obliged himself "to assign and dispoise to the said W. Fergusson any debts or sums of money that he can discover to be due to my said father, by whatsoever person or persons, not exceeding the sum of one thousand merks, for which I have instantly received a full value, renouncing all exceptions to the contrary," &c.

At the time of giving this discharge, no account was made up between them nor any money paid, but Fergusson gave him the following note: "I promise to pay to John Colville, surgeon in Mauchline, the sum of four hundred merks Scots money, at the term of Martinmas next to come, *excluding assigns, and only payable to himself on life*, for value received of him, and notwithstanding of the term of payment, to advance him of the aforesaid sum, what is necessary for out-riding him to go abroad to the army."

Colville died in great penury, but before his death, he executed a general disposition, subject to revocation, in favour of Maitland his uncle, and Isobel Campbell his sister, of all debts, sums of money, &c. which might be owing him at his death, and particularly assigning the above back bond.

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v.
MAITLAND,
&c.

In virtue of this disposition, these parties raised an action for reducing the foresaid discharge on the head of fraud and circumvention, which they inferred from the situation in which Colville was at the time when the several transactions between him and Fergusson were entered into, and from the nature of the securities which were given to Colville in consideration of them.

A condescendence having been given in, the Lord Ordinary "found the reasons of reduction "not relevant, and assoizied," &c. But upon a petition to the whole court, their Lordships "before answer, allowed a proof of the several allegations, and granted commission to examine witnesses in the country upon interrogatories given in for the pursuers." The proof having been led and advised, their Lordships "reduced the discharge, and found that both parties are in the same state they were in before granting thereof." Feb. 1727. July 21. Feb. 13, 1729.

This interlocutor was afterwards adhered to, and it was further "found that the bond of L.230, 7s. narrated in the cancelled back bond, dated in January, 1725, is to be held as a good and subsisting bond, though it doth not now appear, and also that the cancelled back bond is to

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 v.
MAITLAND,
 &c.

“ be held as a valid deed ; reserving all objections
 “ against the debt in the bond as accords.”
 Thereafter, by sundry interlocutors, the de-
 fender was ordained “ to give in a condescence
 “ how and in what manner the sum of L.236, 7s.
 “ in the bond was furnished to Colville, so as to
 “ become a debt against him ;” and further, “ to
 “ give in an account of his intromissions with Col-
 “ ville’s effects, or of any payments made to him
 “ since the date of the said bond.”

Entered Jan.
 28, 1730.
 Amended
 April 6, 1731.

The appeal was brought from two interlocutors
 of the 13th February, 1729, and from the interlo-
 cutors of the 3d, 15th, 22d, and 26th July in the
 same year.

Pleaded for the Appellant :—There is not the
 least evidence of fraud or circumvention, without
 which a bargain, however disadvantageous, cannot
 be voided. Neither is there any proof of such
 weakness on the part of Colville, as should incapa-
 citate him to transact with the appellant, as he
 was in the habit of doing with other persons.
 Moreover, even were facility proved, it is not *per*
se a ground for reducing a contract without some
 evidence of circumvention.

Pleaded for the Respondents :—Generally, that
 the fraud and lesion were abundantly proved by
 the circumstances of the case, as well as the facility
 of Colville by the evidence of several witnesses.

Judgment
 April 5, 1732.

After hearing counsel, “ it is ordered and ad-
 “ judged, &c. that the appeal be dismissed, and
 “ that the several interlocutors therein complained
 “ of, be affirmed ; and it is further ordered, that
 “ the appellant do pay, or cause to be paid to the

“respondents, the sum of L.60, for their costs in
“respect of the said appeal.”

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STORMONT

v.

HENDERSON.

For Appellant, *Dun. Forbes*, and *C. Talbot*.

For Respondents, *P. Yorke*, and *A. Hume
Campbell*.

DAVID, VISCOUNT of STORMONT, *Appellant*;
JOHN HENDERSON, *et alii*, kindly } *Respondents*.
tenants of Lochmaben, - - - }

20th April 1732.

TACK—KINDLY TENANT—In a question between the crown's kindly tenants of Lochmaben, and the heritable keeper of the castle, it was found that the tenants, although having neither charter nor sasine, had yet such a right of property in the lands that they could not be removed, and might assign their rights.

[Fol. Dict. II. p. 419. Mor. Dict. p. 15195.]

By a charter from the crown, the lands of the four towns of Smalholm, Hitae, Hek, and Greenhill, and other lands of Lochmaben, with the hereditary custody of the castle of Lochmaben, and the office of steward of Annandale, and all right, title, and interest, which his majesty or his predecessors had or might have to the said premises, were granted (under the burden of certain annual payments) to the Earl of Annandale.

No. 19.
1610.

1732.
 STORMONT
 v.
 HENDERSON,
 &c.

The lands of the four towns of Lochmaben, above mentioned, were possessed immemorially by the respondents and their ancestors, as *kindly* tenants of the crown, paying rent and services to the constables or keepers of the castle of Lochmaben.

1613.
 1634.

The Earl of Annandale, of these dates, obtained two decrees of removing *in absence* against some of these tenants.

In 1665, David, viscount of Stormont, having married the countess of Annandale, who had her liferent in this estate, brought an action of removing against several of these tenants. Appearance was made for them, and in defence, it was pleaded, that their right was perpetual, and independent of the will of the pursuers claiming under the Earl of Annandale, who was only keeper of the castle. But afterwards, an agreement being entered into with Lord Stormont, the tenants allowed judgment to go in absence, and his Lordship granted a deed obliging himself, his heirs and successors, notwithstanding the decree of removing, no ways to remove the tenants or their nearest of kin, during his wife's right of liferent, or his own right of property in the lands.

1720.

A dispute having arisen between Lord Stormont (the appellant's father) and the respondents, regarding the payment of the land tax, in which his Lordship threatened to remove them if they did not submit to bear the whole burden; they raised an action against him, for recovering payment of his share of the said tax which had been paid by them, and for declaring their immunity from pay-

ing his proportion of the tax in future, and *that they were the crown's irremovable tenants.* A cross action was brought by Lord Stormont for removing them, and having it declared that they were removeable at his pleasure.

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STORMONT
v.
HENDERSON,
&c.

The respondents founded upon immemorial possession, and on three warrants under the royal sign manual, granted upon petitions presented by the tenants to the king; the first two by James VI. ordering the keeper of "the castle to desist from molesting the tenants, and to suffer and permit them peaceably to occupy their possessions."

1592.
1602.

The third, by Charles II. declaring "that the tenants should have been protected, and these warrants above mentioned, obeyed as constant leases, according to the true meaning thereof; and further, his majesty renews the said warrants and leases, and authorises the said tenants and their successors, to possess and enjoy their respective lands, they paying and performing yearly the rents and services paid and performed by their ancestors, anno 1602, and prohibits and discharges the keepers of the castle of Lochmaben, or any one who shall pretend right to the said crown lands in all time thereafter, under all highest pain, to exact more rent, or remove them from their ancient possessions, so long as they thankfully perform the same."

June 1664.

Upon the question of right the Court found "that the pursuers of the said declarator" (the respondents) "had such a right of property to the lands that they could not be removed, and might

Nov. 24, 1726.

1732.
 STORMONT
 v.
 HENDERSON,
 &c.
 Entered
 Feb. 4, 1731.

“dispone their right to extraneous persons.” And this judgment was adhered to.

The appeal was brought from these two interlocutors.

Pleaded for the Appellant:—If the respondents’ predecessors had been ancient kindly tenants of the crown, that would not give them a right of being irremovable by the grantee of the crown, or of assigning their right of kindly tenancy; for this would contradict the fundamental principle of law, that there can be no perpetual assignable estate in land without infestment, (*nulla sasina, nulla terra*,) there being nothing in Scotland similar to the law of copyholds in England. Although kindly tenants are well known in Scotland, it never was held that by the continuance of the favour, they acquired an absolute right against the heritors of the lands.

It is an established rule, that kindly tenants cannot assign, because the only title which they have to the Lord’s favour, is their being kindred to the ancient possessors, which is inconsistent with the notion of the power of assigning.

The two warrants of King James neither give a new right nor confirm any old one, and amount to no more than a command to the constable of the castle of Lochmaben not to oppress the tenants. The warrant from King Charles II. ordering the two former warrants to be observed as leases, was obtained upon a misrepresentation, for the crown had then no right to the lands; and for that reason, when the warrant was brought to the Exchequer, it was stopped and never passed the seal.

But even supposing that the warrants amounted to leases, yet undoubtedly they give no power to assign, and by law no leases are assignable, unless they contain a power of assigning in formal words.

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STORMONT
v.
HENDERSON,
&c.

By these interlocutors the respondents are established in a right which hath no name, nor any foundation in law, and is incompatible with the right established in the appellant and his ancestors by charters and infeftments, in virtue whereof they have possessed the lands for above 100 years.

The allegation of immemorial and uninterrupted possession is contradicted by the three decrees of removal of 1613, 1634, 1665.

Pleaded for the Respondents :—The Respondents and their ancestors have enjoyed their possessions by this tenure of *kindly irremoveable tenants of the crown*, time out of mind, and long before charters or infeftments were in use in Scotland. In the earliest times, proprietors of lands had no titles in writing, but their rights were known and ascertained by their possession, and enrolments in the King's Courts, or in the courts of the other over-lords; and when the estate descended to an heir or a purchaser, the title of the ancestor or author was cognosced by a jury, and the verdict of that jury gave them a full right.

And although since the feudal law was fully adopted into the law of Scotland, titles have generally been constituted by writings, that affords no objection against the respondents, whose right is more ancient than that period of the law of Scotland. There yet remain other rights of the same kind, such as the udal rights in Orkney, where

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v.
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&c.

there are no titles in writing, but lands are by possession only transmitted from father to son; the titles of the tenants or rentallers of the bishoprick of Glasgow, of the monastery of Paisley, and of those who held under the keepers of the King's castles of Dumbarton and Stirling, were of the same nature till of late, and several of the bishop's tythes are held in no other manner to this day.

The right of the respondents is prior to that of the appellant, and not inconsistent with it. The lands in question never ceased to belong in property to the crown. They remained perpetually with the crown as the crown's own property, and the respondents' ancestors continued still *the crown's kindly tenants*. The right of keeping the castle was alone granted to the appellant's successors, as appears from his own title, and particularly from Lord Maxwell's service, by which he is retoured heritable keeper of the castle, but not proprietor of the lands.

The respondents' right has been acknowledged by the crown in the several deeds above mentioned, and although the appellant pretends that the sign manual 1664 was stopped in Exchequer, he has adduced no evidence of the fact, nor can it possibly be true, because a sign manual is not a writing which requires to be passed in Exchequer, but has its full effect by the King's subscription.

The decrees of removing 1613—1634 were obtained in absence, against the inhabitants of the town of Lochmaben, the nature of whose right is not known, but not against any of the respondents' ancestors, and they were part of the encroachments

which occasioned the complaints to the crown. The decree 1665 was likewise obtained in absence, and upon a special agreement, by which it was not to be carried into effect. Never having been acted on, it is now lost by prescription ; nor has any decree in absence the least effect after parties appear and plead on their rights, as the respondents have now done.

An argument was also raised on the fact, that in 1695, when the question arose between the appellant's father and the respondents concerning the land tax, the appellant's father had insisted, *that they were irremovable tenants*, and ought on that account to be taxed, thus acknowledging their right to be such as they now pleaded.

After hearing counsel, " it is ordered and adjudged, &c. that the appeal be dismissed, and that the two interlocutors therein complained of be, and the same are hereby affirmed."

1732.
STORMONT
v.
HENDERSON,
&c.

Judgment
April 20, 1732.

For Appellant, *P. Yorke* and *Dun. Forbes*.

For Respondents, *C. Talbot*, *Ch. Areskine*, and
Ro. Dundas.

ARGYLE

JOHN DUKE of ARGYLE and GREEN-

} Appellant;

JOHN EARL of BREADALBANE, JOHN

CAMPBELL, Younger of Kintraes,
et alii, Creditors of ARCHIBALD
CAMPBELL of Barbreck, . } Respondents.

6th May, 1732.

PERSONAL AND REAL.—The irritant and resolute clauses contained in a charter, not being engrossed in the instrument of assise which only bore to be given “with and under the conditions and provisions in the charter particularly mentioned;”

—It was found that this was sufficient to make the clause in the charter effectual against creditors and singular successors.

Judgment for the appellant *ex parte*.

[Fol. Dict. II. p. 70. Mor. Dict. p. 10806.]

No. 20. ARCHIBALD Earl of Argyle granted a feu charter of the lands of Barbreck, with various irritant, prohibitory, and resolute clauses, in favour of certain substitutes, failing whom, the lands were to return to the Earl, his heirs male and of tailzie.

By the precept of sasine contained in the charter, infestment is directed to be given "with and under the conditions and provisions in the said charter particularly mentioned : " And the instrument of sasine bears, that infestment was given "under the provisoes and conditions in the said charter particularly mentioned."

Adjudications being led against the estate, a competition arose between the creditors of the vas-

sal and the Duke of Argyle as superior, in which it was insisted by the former that they could not be affected by these prohibitory, irritant, and resolutive clauses contained in the charter, inasmuch as they were not particularly engrossed either in the precept of sasine, or in the infeftment which had followed thereon. The Lords found "that the clause in the seisin ('with and under the conditions and provisions in the charter particularly mentioned') is not sufficient against creditors or singular successors, in respect the same does not expressly repeat the irritancies in the charter."

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ARGYLE
v.
BREADALBANE,
&c.

February 13,
1738.

In a petition against this interlocutor, the Duke argued that if it were necessary that the irritant clauses in a charter should be recited *verbatim* in the instrument of sasine, then a sasine taken without such a recital by the grantee, (who has the whole management of that transaction,) must be void; and therefore prayed that it might be found, either that there was no necessity for the recital, or that the infeftment taken without it was void.—The interlocutor was adhered to.

The appeal was brought from the interlocutor of 13th February 1730, two interlocutors of the 25th June 1730, and one of the 24th February 1731.

Entered
March 18,
1731.

Pleaded for the Appellant :—The property of a land estate is vested by charter and sasine. The charter does not create an estate without sasine, and sasine cannot be given so as to be effectual, without express warrant from the granter contained in the precept of sasine, and the grantee cannot thereby take a greater estate than is conveyed to him in the charter and precept. A purchaser or

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ARGYLE
v.
BREDALEBANE,
&c.

creditor cannot be in a better condition than the vender or debtor.

The vassal or grantee himself is always possessed of the charter, which contains the precept of sasine, and takes infeftment, so that he has the instrument of sasine drawn up by a notary of his own choosing, in such form as he thinks fit to direct, without the knowledge or consent of the superior.

The form of all precepts of sasine is to give full power and authority to [*blank*] to give real and heritable state and sasine to the purchaser of the lands described, and the blank is left to be filled up with the name of any person whom the disponent shall think fit to appoint. The choice, therefore, of the person, who, upon the part of the granter, is to execute this order, as well as of the notary, who is to attest the execution of it, being left to the grantee, it is incumbent on him to see that the sasine taken is pursuant to the charter and precept. And if it be not so, either the sasine must be limited to the conditions under which the precept directed it to be granted, or it must be void, as being not warranted by the precept. Otherwise this absurdity would follow, that the grantee could by artifice or error create to himself a greater estate than was granted or intended to him, and divest his superior, the granter, of the estate expressly reserved to him and his heirs.

In the present case it is expressed in the instrument of sasine, that the same was given with and under the provisions in the charter mentioned; so that if the creditors had looked into the register of sasines, they would have learned that their debtor's

estate was fettered ; and although the charter was not registered, they might have seen it in the debtor's custody, and thereby discovered what those conditions were, and that in consequence of them the estate would not be a security for their debts. But, as it is to be presumed that they trusted him upon his personal security, they can have their remedy only against him, and the estate ought to revert to the heirs of the granter, in terms of the original grant.

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 v.
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 &c.

No creditor or purchaser can rely on such infestments as they find in the registers, as evidence that the borrower or seller has really and effectually such an estate in him as the infestments express ; because an infestment without the charter and precept is of no validity to secure any estate. But the lender or purchaser must see the charters and precepts on which the infestments are founded. This imposes upon neither party any difficulty, because it is to be presumed that the proprietor is in possession of his own titles, and if he does not exhibit them, no money will be paid or lent.

But after a man is satisfied by inspection of the titles, that he from whom he would purchase, or to whom he would lend, is the full proprietor of the lands, the real and only use of the register is that he may be secured against latent claims or incumbrances ; and this purpose is effectually answered by the register, for no claim or incumbrance that is not recorded can affect the purchaser or creditor ; but still, notwithstanding the register, he must be able to support the validity of the recorded infestment under which he purchased, by

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 ARGYLE
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 BREADALBANE,
 &c.

producing its warrants, and therefore ought not to have purchased or lent his money without seeing those titles.

The appellant stands infest, as immediate vassal of the crown, in the very lands in question, which the respondents must have seen from the register. They must likewise have known (because it is the undoubted law) that the infestment to the vassal, which they saw on record, would not defend against an action of reduction and improbation at the appellant's instance, without producing for its support the charter and precept on which it followed. They could not therefore lawfully rely on the infestment alone for their security, without having seen the charter in which the precept was contained; and if they saw the charter, they must have seen in what manner the estate was limited to the vassal, and consequently could not have contracted with him *bona fide* on that security.

For the Respondents—No appearance was made, but their argument in the Inferior Court is thus shortly stated in the appellant's paper.

The irritant clauses contained in the charter are not repeated in the precept of sasine, or in the instrument of sasine which is recorded in the register of sasines. Therefore although the grantee and his heirs are bound by the conditions in the charter, yet the same will not extend to creditors and purchasers, unless repeated in the sasine and appearing in the register, which was established for their security, and is the only place to which they can resort for information as to the state of the right on which they are about to rely.

“ Counsel appearing for the appellant, but none
 “ for the respondents, the appellant’s counsel was
 “ heard ; and having stated the matter at large, and
 “ prayed a reversal of the said interlocutors, and
 “ such relief as to the house should seem meet ;
 “ and being withdrawn,

.1732.
 ARGYLE
 v.
 BREADALBANE,
 &c.
 Judgment
 May 6, 1732.

“ It is ordered and adjudged, &c. that the said
 “ interlocutors complained of be reversed ; and it
 “ is farther ordered and adjudged that the clause
 “ in the vassal’s sasine, (*videlicet*) [‘ with and un-
 “ der the conditions and provisions in the charter
 “ particularly mentioned, granted by Archibald
 “ Earl of Argyle, the 5th January 1678,’] is suf-
 “ ficient to secure to the superior against creditors
 “ and singular successors, all the conditions and
 “ provisions in the said charter contained.”

For Appellant, *P. Yorke* and *Dun. Forbes*.

This judgment proceeded *ex parte* ; but by the above extract from the journals of the House of Lords, it would appear to have been as solemn and mature a decision of the point of law as the circumstances of the case admitted of. The judgment of the Court of Session is founded on by Lord Bankton, B. II. t. 3. § 44. and by Erskine, B. II. t. 3. § 51. Neither author seems to have been aware of the reversal.

1733.

EASTON

v.

STIRLING.

ROBERT EASTON, <i>et alii</i> , Feuars of	} <i>Appellants</i> ;
Denny, in name and behalf of their	
Tenants, - - - - -	
WILLIAM STIRLING of Herbertshire,	} <i>Respondent</i> .
Esq. - - - - -	

27th February, 1733.

TEINDS.—*BONA FIDE CONSUMPTION*.—An heritor possessing his teinds by virtue of a grant from another as tackaman, found to be *bona fide* possessor until interpellated by the titular.

Payment of a certain rate in name of teinds to the minister for 40 years without challenge from the titular, found to be a *bona fide* payment *quoad* the whole teinds, and to exoner the heritor of all bygonies.

PROOF.—It was found by the Court of Session, that in a claim for bygonies, the present rental is the presumptive rule *retro*, except in so far as the heritor can prove a less rental. No judgment upon this point was pronounced in the House of Lords.

[Fol. Dict. I. p. 110. Mor. Dict. p. 1717.]

No. 21. THE barony of Denny, belonging to the Earl of Wigton, was divided into about fifty farms, which, in 1660 were converted into so many feus.

In 1723, Mr. Stirling, having right by a crown charter to the lands and barony of Herbertshire, with the teind sheaves, as well parsonage as vicarage of the kirk of Denny, raised an action against the feuars of Denny, for recovering from them the full teinds payable for all their lands for forty years bypast.

In defence, it was stated, that the teind had never been uplifted or claimed by the pursuer or his ancestors within the memory of man ; that, on the contrary, six of these feus had immemorially paid a certain rate in satisfaction of parsonage teinds to the Earls of Wigton ; six others had paid a similar rate to the pursuer and his ancestors ; and that a like rate had been paid out of the remaining thirty-eight to the successive incumbents of the parish, to whom also a certain rate of money had past all memory been paid out of the whole fifty feus in satisfaction of vicarage teinds.

In the feu-rights granted by the Earl of Wigton to the six feuars who paid a rate for their parsonage to that family, the tithes were granted along with the lands, and the particular rate anciently paid was reserved as tithe duty.* But in the other forty-four feu-rights, the lands only were granted, and the teinds were left to those who have best right to them.

A proof of the value of the teinds claimed was February 15, 1737. allowed.

The mode of proof proposed was, with respect to part of the lands which were held in lease to assume, in terms of the statute, one-fifth of the rent as the teind ; and as to the rest, to ascertain by the examination of witnesses its estimated value.

To both of these methods it was objected, that although they might be an equitable means of fixing the value with regard to the present or future payment of the teinds, yet in a question of bygones

* It appears from the interlocutor of the 31st December 1730, that the Earl had a tack of the teinds ; but the fact is not otherwise instructed by the appeal papers.

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 EASTON
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v.
STIRLING.

during forty years, it would be most unfair to compute them according to the present improved state of the lands.

Various interlocutors were pronounced, of which it is only necessary to detail the following:

January 7,
1730.

The Lord Ordinary found, “ that the rents payable to the defenders by their tenants, is the rate for determining the *quota* of their tithes ; that the value of the houses let with small farms, or the annual expense of upholding them, ought not to be deduced from the rent; nor the feuduty payable to the superior ; that there ought to be no deduction where cottars houses are not upheld by the masters ; that there ought to be no deduction on account of the expense of liming ; and that where butter, cheese, and poultry are valued at a price certain, it is to be taken as part of the rent.”

February 7.

Adhered to former interlocutors, and “ repelled the defence of *bona fide* possession and consumption, and found the defenders liable for their tithes to the pursuer for forty years preceding the date of their citation in this process, except as to such as have made annual payment to the pursuer in name of teind, who are found liable only for arrears from and after the date of their discharges.”

July 4.

“ Repelled the defence of *bona fide* possession, as it was insisted on in the general ; but in so far as it did appear that any of the defenders had paid their teinds to the Earl of Wigton, prior to this suit, that such payments should be deducted from their tithes ; and that the payments made

“ to the minister should be deducted in the same manner.”

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STIRLING.

July 20.

“ Found that it did not appear from the proof that the payments made to the Earl of Wigton was teind, but that the defenders are by their contract expressly bound to pay the teind to those having interest thereto yearly ; and therefore that there ought to be no deduction on that account,” &c.

Upon a petition against these interlocutors, “ the Lords sustained the defence of bona fide payment : as to such as uniformly paid to the minister of Denny a certain sum in name of tithes, to absolve them from surplus tithes preceding the citation in this process ; and as to such as by their feu-contracts from the Earl of Wigton their superior, have right to possess their teinds during the tack his Lordship had of them, found that the payment of teinds to him was made bona fide, and is relevant to assoilzie such of the defenders from bygonies during the years of the tack or tacit relocation, and remitted to the Ordinary to proceed accordingly.”

Dec. 31.

The pursuer petitioned against this interlocutor, when the Lords found “ that the sums paid to the minister did not exoner such of the defenders who made those payments from paying the remainder of their teinds to the titular, and found them liable for the same for forty years preceding the citation ; and sustained the defence of bona fide payment in favour of such as by their feu-contracts from the Earl of Wigton their superior, have tacks of their teinds from him, and have

June 25,
1731.

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v.

STIRLING.

“made payments conform, until they were interpellated by the pursuer’s citation, and remitted to the Ordinary to consider the case of such of the defenders as have not made payment conform to the tacks in their feu-contracts, and to proceed and determine accordingly.”

July 28.

In terms of this interlocutor, the Lord Ordinary found the defenders liable for their tithes for forty years preceding the citation, and decerned accordingly against them, excepting as to six of them whom he absolved from the payment, “in respect of the payment made by them to the Earl of Wigton.”

February 2,
1732.

The Lords adhered to this interlocutor, and found “that the present rental is the presumptive rule *retro*, except in so far as the defenders could prove a less rental,” &c.

Entered
March 14,
1732.

The appeal was brought from the interlocutors of the 3d December 1723; 15th February 1727, 31st January, 1st and 20th February, and 17th June 1729; 7th January, 4th and 7th February, 4th, 8th, and 10th July, and 25th November 1730; 25th June, 9th and 28th July, and 23d December 1731; 2d, 5th, and 25th February 1732.

*Pleaded for the Appellants:—*Thirty-eight of the appellants having paid to the incumbents a certain customary rate for the teinds of their lands for time past memory, and having received discharges from persons, who, for ought known to them, had a full title to the teinds; and the respondent never having given them the least notice of his right or pretension, they acquired the surplus by having received and made use of it *bona fide*, and therefore ought

not to be made accountable for any tithe preceding the date of the action, any more than those who paid to the Earl of Wigton and the respondents, without knowing what title was in them.

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By the law of Scotland the interest of titulars is valued at only nine years purchase, and that in favour of the heritors ; yet by these judgments, the interest of the respondent as titular is by his own neglect made worth forty-nine years purchase, he having right according to them to a full fifth of the rent for forty years prior to the commencement of the action.

At all events, if he has any claim for arrears, these ought to be estimated not according to the present value of the lands, but by legal proof, to be brought by himself, of the actual value of the teinds at the time they became due ; for the law which makes the fifth part of the rent the rule, relates only to the value of the teinds in time to come. And although valuing by *sowing* and *holding*, which depends on the evidence of witnesses only, may be a reasonable method of estimating with respect to the time to come, because necessary, there being no other possible way of knowing future products but by estimation ; yet with respect to arrears it is not reasonable, because not necessary. The actual produce of the past years is what the titular has interest in the tenth of ; and if by his neglect the proof of that actual produce is defective, the loss arising from that deficiency ought to fall on him to whom alone it can be imputed, and cannot be supplied by allowing evidence from opinion or esti-

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mation only, to the prejudice of the heritors who may have kept no accounts.

Pleaded for the Respondent:—1. The respondent has produced an undoubted title to the teinds of the lands belonging to the appellants. This title was upon record, and the appellants therefore cannot be supposed ignorant of it. None of the appellants have produced or pretended any right to any part of these teinds, although those who produced a colourable title under the Earl of Wigton have been absolved from the claim. But the defence of *bona fide* consumption can never have place without a colourable title; and the appellants having none, must have known that the right was in some other person, and consequently that they were accountable for them. They could not suppose that the payments which they made to the Earl of Wigton were in lieu of tithes, because in the grants which they held from the Earl, there is an express proviso that they should relieve the granter from the payment of tithes for the lands to such persons as had a right thereto.

Ministers have a right to maintenance out of the teinds, but cannot be presumed to be titulars, especially since the act 1690 giving to the patron the same share of teind that then remained to the clergy, and the receipts of teind-duty taken from the minister by the appellants destroy this presumption bearing "teinds payable to him out of the lands," so that they afford no ground for supposing that the minister was titular, or had a power to discharge the whole teinds. Therefore all the sums which the appellants paid to the minister being allowed to

them, it would be extremely unreasonable that the payment of a part of a demand to a person perhaps not properly entitled, should be held as a satisfaction for the surplus demand to the person who is rightly entitled to the same.

After hearing counsel, "it is ordered and adjudged, &c. that the interlocutor of the said Lords of Session, made the 31st December 1730, whereby they sustained the defences of *bona fide* payment as to such as uniformly paid the minister of Denny a certain sum in name of teind, be, and is hereby affirmed with this addition, (*videlicet*) ['for forty years before the commencement of the suit in this cause,'] and it is also ordered and adjudged, that the several interlocutors complained of in the said appeal or parts thereof, which are inconsistent with the said interlocutor as affirmed and amended, be, and are hereby reversed; and as to those several interlocutors or parts thereof, which are consistent with that interlocutor as affirmed and amended, the same are hereby affirmed; and it is hereby further ordered that the said Lords of Session do proceed in the cause accordingly."

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v.
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Judgment
February 27,
1733.

For Appellant, *P. Yorke*, and *Dun. Forbes*.
For Respondent, *C. Talbot*, and *Will. Hamilton*.

1788.

HERON
v.
DUKE OF
QUEENSBERRY.

PATRICK HERON of HERON, Esq. *Appellant*;
CHARLES, DUKE of QUEENSBERRY } *Respondent*.
and DOVER, - - - - - }

27th April, 1788.

TAILZIE.—An heir of entail in possession purchased the *dominium utile* of lands, the superiority of which was included in the entail, and took a resignation *ad remanentiam* in his own hands as superior,—found that the *dominium utile* is not thereby entailed.

No. 22. A MINUTE of sale was entered into between the appellant and respondent, by which the latter, in consideration of the sum of L.3000 sterling, agreed to sell to the appellant the lands of Loch-house and Thornick, in the stewartry of Annandale, and to grant to him, his heirs and assignees, an ample and valid disposition and charter and precept of sasine of the said lands, to be holden of the respondent and his heirs male and of entail succeeding to the dukedom of Queensberry, as immediate lawful superiors thereof, in feu blench, with a clause of absolute warrantry against all incumbrances and grounds of eviction.

The appellant, being afterwards advised that the Duke had not a good title to dispose the lands to him, refused to complete the purchase; upon which an action was raised to compel him to accept of the conveyance tendered, and to pay the price.

The appellant stated, in defence, that the respondent held his estates under a strict entail, executed by the late Duke, and that the superiority of the lands in question was originally included under that entail; that the property of these lands having been purchased by the respondent's curators, the mode taken to complete his title was by resignation *ad remanentiam* into his (the respondent's) hands as superior, whereby the right of property was merged, and the entail became as effectual over it as if the late Duke had at the time of making the entail been infeft in the property of the lands. The appellant likewise insisted that the heirs of entail ought to be made parties to the action.

The respondent argued that nothing but the superiority was affected by the entail, the granter having no other interest in the lands, nor had the respondent done any thing whereupon the *dominium utile*, purchased with his own money, could be subject to the provisions and restrictions of his father's settlement. That therefore, as the feu was no part of the entailed estate, there could be no occasion to make the heirs of entail parties to an action for compelling implement of a contract for the purchase of that feu.

The Lord Ordinary having reported the case to the Court, they found "that the late Duke of Queensberry, granter of the tailzie, having only the right of superiority of the lands in question in his person, at the time of making the tailzie, the respondent acquiring afterwards the property thereof, though by a resignation *ad remanentiam*,

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HERON

v.

DUKE OF

QUEENSBERRY.

January 10,
1733.

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QUEENSBERRY.

“ does not subject the property of the feu to the
“ said tailzie, or any clauses irritant or resolute.
“ therein, and that there is no necessity for calling
“ the heirs of tailzie in this process, and therefore
“ repelled the defence, and ordained the appellant
“ to implement the minute, and decerned accord-
“ ingly.”

Entered
January 31,
1733.

The appeal was brought from the above interlo-
cutor.

Pleaded for the Appellant:—By the entail, the lands are limited to the persons therein named, and though that settlement cannot take place, so as to affect the *dominium utile* as long as the right of the vassal remains ; yet so soon as the vassal's right is extinguished by a resignation *ad remanentiam*, the case becomes the same as if no right of vassalage had ever been granted, that being no longer a separate subsisting estate, but merged and sunk in the superior's right, and consequently affected by the prohibitory and irritant clauses to which that right is subject.

The effect is the same here as it would be in the case of recognition, or any other feudal delict, by which the property became consolidated with the superiority. A resignation *ad remanentiam* is no more than an extinction of the fee resigned ; it is not a title capable of conveyance ; for the only title upon which a conveyance could be made, is the superior's infestment ; but that infestment in this case is subject to those clauses which prevent any alienation.

Although the purchase money of the estate in question was the property of the respondent, and

the purchase made when he was a minor; yet he, after coming of age, settled accounts with his guardians, and allowed of the application of the money, which was a confirmation of the purchase and of the method whereby the lands had been conveyed.

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The heirs of entail, not being parties to the action, will not be bound by any determination of this case, and they ought, therefore, to have been called, that in case the appellant should be obliged to complete the purchase, he may be safe from any challenge on their part.

*Pleaded for the Respondent:—*The naked superiority being the only estate that was in the maker of the entail, that and no more was, or could possibly be subjected to its fetters; the free disposition of property being by the law of Scotland incapable of restraint by implication, or without express conditions and provisions. And although accidentally the respondent's titles are made up by resignation, whereby the property is consolidated with the superiority, yet they are capable of being again separated by a new grant of the feu; and nothing in the entail hinders such a grant of the feu, the provisions of that settlement reaching no further, than to the superiority, which is alone contained in it.

Without admitting that such would be the consequence of consolidation upon recognition, or any other feudal delinquency, there is a wide difference between the two cases: in the one, the accession of the property to the superiority is a legal consequence of the superiority; and there may be some

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v.
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QUEENSBERRY.

colour for saying that the entail affects all the natural and necessary accessions to the entailed estate, as well as the estate itself; but in the present case, the accession of the feu is no necessary consequence of the respondent's having been possessed of the superiority; as superior, he had no title whatever to reassume the feu; he purchased *tanquam quilibet*; and if his guardians, in his minority, thought fit to lay out his money on this purchase, and to make up his titles in the manner described, which is legal, it would be most unreasonable that what was so purchased with his own money should not be at his own disposal.

Judgment
April 27,
1723.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the interlocutor therein complained of be and is hereby affirmed."

For the Appellant, *C. Talbot*, and *Will. Hamilton*.

For the Respondents, *Dun. Forbes* and *W. Noel*.

1733.

IRVINES
v.
CUMMING, &c.

ALEXANDER IRVINE of Crimond,
Esq. and WILLIAM IRVINE of Ar-
tamford, Esq. his brother, } *Appellants;*

SIR ALEXANDER CUMMING, Mr.
JOHN OGILVIE, JAMES GORDON,
and others, the Trustees for the
Creditors of Alexander Irvine of
Drum, &c. } *Respondents.*

4th May, 1733.

CONFUSIO.—A bond over an entailed estate being granted to the substitutes in the entail, and the succession to it having opened to the heir in possession of the estate, but he not having made up any title to the bond,—it was found that the debt is not extinguished by confusion in his person, but is still a subsisting burden on the estate.

[Fol. Dict. i. p. 196. Mor. Dict. p. 3042.]

ALEXANDER IRVINE of Drum tailzied his estate up-
on himself, the heirs male of his body, and certain
other substitutes. The heirs were restrained from
charging the estate with debt, but it was particu-
larly provided that all the debts then or thereafter
to be contracted by the maker of the entail should
remain a charge on the estate.

No. 23.
1683.

He afterwards executed a bond of provision for
£80,000 Scots, in favour of his *second* son, Charles,
and the heirs male of his body, whom failing, to the

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 v.
 CUMMING, &c.

heirs male of the body of such person or persons as he had by the said entail appointed to succeed to him in the said estate.

Upon the death of the entailer and of his two sons without issue, the succession as well of the entailed estate as of the said bond of provision, devolved upon Alexander Irvine, who was served heir of tailzie in the estate, but did not expedite any service to the bond. He was succeeded by his son Alexander, who did not make up any title, but in 1721 granted a bond for L.10,000 sterling to Sir Alexander Cumming in trust for certain purposes. Upon this bond Sir Alexander charged the said Alexander Irvine to enter heir of provision to Charles to the said bond of L.80,000, and upon his renunciation, obtained an adjudication thereof against him, and thereafter, upon a like charge, to enter heir of tailzie in the estate of Drum, obtained an adjudication against the estate for the sum of L.80,000 Scots. Sir Alexander Cumming then brought a process of declarator before the Court of Session against Alexander Irvine, and the heirs of tailzie, to have it found and declared that the said bond for L.80,000 was a subsisting debt and burden on the entailed estate.

In defence to this action, it was objected that the right of succession to the bond, originally due to Charles, having descended to Alexander Irvine, and the right of succession to the entailed land estate having likewise descended to him by the death of his father, he, as heir of entail, became debtor for the bond, and at the same time creditor for it as heir of provision to Charles ; and that therefore the

bond was merged, or extinguished *confusione*, the same person being both debtor and creditor.

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v.

CUMMING, &c.

It was argued for the pursuer, that Alexander Irvine never having made up any title in his person to the bond, as heir of provision to Charles, he could not have any right thereto. The bond was an estate quite distinct from the entailed land estate; and he might have taken up or waved the succession to both or either as he thought fit. In fact, he had renounced the bond in favour of the creditors, who had completed a proper title to it, and it belonged now to them and not to him; therefore, he never having been creditor in the bond, or established any right to it, the debt was not merged or extinguished by confusion, but remained a subsisting debt, and an effectual charge on the estate, established in the creditors by their adjudication.

The Lords found "that the heir male of Mui- Jan. 4, 1726.
"hill being also served heir of entail to the estate of
"Drum, his service does not state him in the right
"of the said bond of provision of L.80,000 Scots,
"so as to operate a confusion in his person, and
"that this Drum being charged to enter heir in
"special to Charles, and adjudication having there-
"on followed, does not operate a confusion of
"debtor and creditor in this Drum's person;" and
therefore "found that the said bond of provision is
"not extinguished, but is still a subsisting debt on
"the estate of Drum."

Various judgments, in terms of these interlocutors, were subsequently pronounced.

The appeal was brought from the interlocutors Entered
of the 4th and 26th January, 1726, part of an in- Jan. 26, 1732.

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IRVINES

v.

CUMMING, &c.

terlocutor of the 21st July, 1727, and those of the 7th and 22d February, 1727.

Pleaded for the Appellants:—1. The intention of the entailer is apparent, that this bond should merge in the entailed estate, otherwise he would not have limited it, upon failure of *Charles* and the heirs male of his body, to the heirs of entail. The bond was to descend to the same person as the estate, and accordingly, the present Drum having right both to the estate and the bond, the bond became merged and extinguished *confusione*.

2. It being admitted that if the heir of entail, now in possession, had been served heir of provision to *Charles*, the bond would be merged and extinguished; the proceedings at law in this case have the same effect, for having by the usual process charged him to enter heir to *Charles*, such charge to enter heir is, *fictione juris*, of the same force and effect, as if the heir so charged was actually served heir, and the bond must therefore be considered as extinguished.

Pleaded for the Respondents:—1. The heir first named to succeed to the estate was Alexander Irvine of Muithill, and the heir named to succeed to the bond was the heir male of his body. The father had right to the estate, and the son right to the bond; so that the granter's intention is manifest, that the bond should remain a separate estate.

Accordingly the succession to the bond became open to the present Alexander Irvine during his father's lifetime, and not to the father; and although the succession to the estate did afterwards, by the death of the father, open to him, it was in his

power to wave both successions, or either of them ;
and therefore, until separate titles were made up to
both, the bond could not be merged or extinguish-
ed in his person.

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CUMMING, &c.

In point of fact he did wave the succession to
the bond, and left it to be affected by the creditors,
who have accordingly established a legal title to it.

2. The plea that the charge to enter heir was
equivalent to a service as heir, is grounded on a
mere fiction, and has no foundation in law. Such
a charge gives the person charged no right to the
bond, but is merely a form introduced in favour of
creditors, by which the debt may be made a real
and effectual charge on the estate of the granter of
the bond.

After hearing counsel, " it is ordered and ad- Judgment
" judged, &c. that the appeal be dismissed, and May 4, 1733.
" that the several interlocutors therein complained
" of be, and the same are, hereby affirmed."

For Appellants, *Dun. Forbes.*

For Respondents, *P. Yorke, and Ro. Dundas.*

1733.

ANNANDALE

v.

HOPE.

GEORGE, MARQUIS OF ANNANDALE, *Appellant*;
JOHN, LORD HOPE, *Respondent*.

28th May, 1733.

TENOR.—Found that the *casus amissionis* must be proved.
A charter and sasine proceeding on the procuratory of resignation contained in a bond of tailzie, found not sufficient to prove the tenor of the bond.

- No. 24. WILLIAM, Marquis of Annandale, in terms of his contract of marriage with Sophia, daughter of Mr. Fairholm of Craigiehall, executed a bond of tailzie, by which he settled his estates on his son James in fee, and himself in liferent, whom failing, the other heirs male of the marriage; whom failing, the heirs male of his body; whom failing, the heirs female of the marriage, &c. The deed contained prohibitions against selling, contracting debts, &c. but from all these James, the institute, was exempted and free. Upon the procuratory in this deed, a crown charter was obtained, and infestment duly taken thereon.

1690.

1726.

The Marquis by a second marriage had issue, the appellant and another son. He was succeeded by his son Marquis James, who made up no other title to the estate, but possessed on the charter and sasine above mentioned. James executed a voluntary settlement of the estates in favour of the respondent, son of his sister the Countess of Hope-

ton ; but, upon his death, the appellant, after being served heir to him, raised a reduction of this settlement, on the ground of its being a contravention of the entail.

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ANNANDALE
v.
HOPE.

Production of the entail being ordered, and it not being to be found, the appellant then founded on his title as heir of his father, and insisted that the settlement 1726 should be reduced, as executed by one having no complete title, the charter and sasine being inept as without a warrant. In order to meet this plea, the respondent raised an action of proving the tenor, in the course of which he produced the foresaid charter and sasine, bearing to be in terms of the procuratory, and several other deeds executed by Marquis William, which proceeded on a recital of the bond of tailzie. In defence, it was pleaded that the *casus amissionis* ought to be proved ; that the deed had been in the hands of Marquis James after his father's death ; and that it contained other and different clauses than what appeared upon the charter and sasine.

The Lords “ found the *casus amissionis* not necessary to be proven in this process, and found “ the deed by William, Marquis of Annandale, “ which is the warrant of the charter under the “ great seal, in the year 1690, proven to be of the “ tenor libelled by the Lord Hope, and decerned “ in the tenor, and declared accordingly.”

February 16,
1733.

The appeal was brought from several interlocutors of 18th and 26th January, and 16th February.

Entered
February 22,
1733.

Pleaded for the Appellant :—1. The respondent has not proved the *casus amissionis*, which by the law of Scotland, is necessary in an action of proving

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 ANNANDALE
 v.
 HOPE.

the tenor, in all cases where it can be supposed that the party who brings the action may have any advantage in concealing the original deed. The deed has been proved to have been in the possession of Marchioness Sophia for behoof of her son James, and its not being found now, renders it extremely probable that it was destroyed or concealed, as containing clauses which disabled him from making a voluntary conveyance to disinherit his brother, and separate the estate of the family from the honors.

2. The respondent has, at most, proved the tenor only of one part of the deed, viz. the procuratory of resignation, which is all that is or can be inserted in a charter; and the force of this evidence depends entirely on the judgment and care of the writer to the signet, being the officer who prepares the signature, and from that the charter for passing the seals. But it no way appears what were the narrative or dispositive parts of the deed, which may have been, (and, according to the circumstances of the case, most probably were,) such as entirely disabled Marquis James from altering the succession of the heirs male of the body of Marquis William.

3. The respondent has not proved that the deed of entail was duly signed by Marquis William, in the presence of two witnesses thereto subscribing, or that the names and designations of the writer and witnesses to the deed were inserted; any of which circumstances being omitted, the deed itself, if it were produced, would be of no effect.

*Pleaded for the Respondent:—*1. In proving the tenor of title-deeds to land estates, it is not neces-

sary to prove the *casus amissionis*, though it may be required in the proof of the tenor of bonds, which are extinguished by being retired into the hands of the obliger; and this distinction has been confirmed by repeated decisions.

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ANNANDALE
v.
HOPE.

When procuratories are lost, stolen, or destroyed, the proof of the *casus amissionis* is generally not only difficult but impracticable; and if it were necessary to prove the same, many proprietors, as well heirs of entail as others, must be reduced to a state of beggary.

It is not sufficient to suggest that clauses and limitations might have been contained in the procuratory, and omitted out of the charter, but he who makes such an averment must support his allegation by evidence; and in this case, it would be unreasonable to suppose that Marquis William would have passed a charter in terms less advantageous to himself than were contained in the procuratory, which was his own deed, or that he would have possessed the estate for thirty years under this charter, without perceiving the difference, if there was any, between it and its warrant.

2. The honesty and accuracy of all employed in public offices is still to be presumed. This charter passed the Court of Exchequer, and must therefore be presumed to have been accurately drawn. Constant experience proves that charters are agreeable to the procuratories upon which they follow, which operates a presumption, which has been founded on by all lawyers and judges, that the tenor of writings lost may be found proved from charters and sasines passed upon them, particularly when

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 v.
 HOPE.

there are extant deeds under the hand of the granter which relate to the writing lost.

3. In most cases where the deed is not extant, it is impossible to know, much more to prove, the names of the writer of, and witnesses to the deed, but where the contracts are proved, they are presumed to have been regularly executed. So the House of Lords found, in the case of *Blackwood v. Hamilton of Grange*.^{*} Besides, in the present case, Marquis William, by repeated deeds acknowledging that he executed the bond of tailzie, proves that it wanted none of the solemnities of law.

Judgment
 May 28, 1733.

After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutor of the 16th February, whereby the Lords of Session found "the *casus amissionis* not necessary to be proven "in this process; and also found the deed by William Marquis of Annandale, which is the warrant "of the charter under the great seal, in the year "1690, proven to be of the tenor libelled by the "said Lord Hope, and decern in the tenor, and "declare accordingly, be, and the same are here- "by reversed; And it is hereby further ordered, "that the defender be assoilzied from the action "of proving the tenor."

For Appellant, *P. Yorke, Dun. Forbes, Ro. Dundas*, and *Will. Grant*.

For Respondent, *C. Talbot, Ch. Areskine*, and *N. Frazierley*.

^{*} Robertson's Appeal Cases, No. 48, p. 211. (*Forbes*, 704. *Mor. Dict.* p. 15819.)

1733.

DENHAM
v.
BAILLIE.

ARCHIBALD DENHAM of Westshield, }
Esq. Advocate, - - - - - } *Appellant*;
MR. JAMES BAILLIE, W.S. *Respondent*.

5th June, 1733.

TAILSIE.—ACT 1685, c. 22.—Debt contracted by an heir of entail not infest, but possessing upon a general retour, in which the clauses of the entail against contracting debt were not repeated—found to be not chargeable against the entailed lands. Found likewise that the same debt was not chargeable on the entailed lands, although the entail had not been recorded in terms of the act.

SIR WILLIAM DENHAM of Westshield executed a strict entail of his estate. Upon his death without issue, the succession devolved upon Robert Baillie; and no infestment having followed upon the entail, which was never registered, he was retoured upon a general service as heir of provision to Sir William, without inserting in the retour the conditions, limitations, and irritancies contained in the entail. Upon this personal title he possessed the estate until his death, by the style of Sir Robert Denham. He contracted considerable debts. No. 25.

In 1719 the appellant, being the next substitute, brought an action against Sir Robert, (which, upon his death, was continued against his heirs,) to have it found that, the clauses irritant and prohibitory of the entail not having been inserted in the general retour, an irritancy was incurred in terms of the act 1685, c. 22. The Court of Session found that Feb. 1726.

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DENHAM
v.
BAILLIE.

the irritancy had been incurred; and in virtue of their decree, the appellant was served heir of entail to Sir William, and entered on possession of the estate.*

Thereafter, James Baillie, a creditor of Sir Robert Denham, brought an action against the appellant, to have it found and declared "that certain debts due to him from the said Sir Robert might lawfully affect the estate of Westshield, for that, when the debt was contracted the debtor was in possession of the estate, by a right which enabled him to affect or convey the same. That though the irritant and resolute clauses in the entail had been effectual against the heir of entail, and did limit his right, yet they could have no effect against his creditors, with respect to whom the case was the same as if the procuratory of resignation had been absolute, without any clause irritant or resolute, in regard that the entail being made subsequent to the act of parliament 1685, it was necessary that in conformity to the directions of that act the entail should be recorded, and the clauses irritant and resolute be inserted in the conveyances or titles under which the heirs of entail possessed, which being omitted, these clauses could not be effectual against creditors."

In defence, it was answered, that although a creditor, contracting with an heir of entail infest, who

* After the decision of the present case in the House of Lords, this judgment was appealed from, and reversed. February 17, 1737. *Vide infra.*

has omitted to insert in his infeftment the irritant and resolute clauses, may be secure, because he contracts *bona fide* on the faith of the record where the infeftment is registered; yet the case is different where a creditor, as in this case, contracts with an heir of entail, who has only a personal latent right, limited by irritant and resolute clauses; he does not contract on the faith of any record, and he ought to have examined the personal right, which not appearing on any record, and being *ipso jure* qualified by the conditions contained in it, must necessarily be effectual against any person who contracts upon the footing of it. The purview of the statute concerning entails is to regulate such only as being made real by infeftment, become a fund of credit, on which creditors or purchasers may rely.

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The cause being reported by the Lord Ordinary, ^{23d Nov.} the Court found "that the said estate is still affect-^{1731.}
"able by the pursuer, as creditor to the said Robert
"Baillie," (Sir Robert Denham.)

This judgment was adhered to.

The appeal was brought from the interlocutors ^{Entered} of the 23d and 27th Nov. 1731, and the 22d Nov. ^{January 23,} and 15th Dec. 1732. ^{1733.}

Pleaded for the Appellant :—He who has only a personal right, on which no infeftment has followed, limited by express conditions not to charge the estate with debt, cannot, in breach of those conditions, and beyond the powers given him by the title under which alone he possesses, burden the lands with debt.

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Although the contracting debt is a breach of the entail, and is a just ground for irritating the contractor's right, it does not thence follow that the debt must be a charge on the estate. This is the case of every irritancy incurred by contracting debt; the heir forfeits his right, but the debts are nevertheless void, and will not affect either the estate, or the substitute to whom upon the forfeiture it descends.

As the respondent has contracted, not with an heir of entail infeft, whose right might appear absolute, nor upon the faith of any record, but only upon the footing of a personal right, expressly qualified with a prohibition to contract debt, he must be affected with the qualities attending that right.

But the act 1685 gives security to those creditors only who have *bona fide* contracted with persons who are infeft, and whose infeftments are recorded without any limitation, whereby creditors contracting on the faith of the record, may be induced to believe that the right is simple and absolute. Those again who transact on the faith of a personal right only have no security from the act, and ought to have none, because it is impossible to suppose that they would transact without seeing the personal title of him whom they trust; and therefore they cannot be ignorant of the prohibitions by which he is disabled from contracting debt.

*Pleaded for the Respondent:—*At the time of contracting this debt, Sir Robert Denham was legally possessed of, and entitled to the estate, in virtue of the original disposition, and his general ser-

vice as heir of provision to Sir William Denham ; and as that service established in Sir Robert a good right to the lands, and there were no restrictions either expressed or referred to in the retour of that service, and no publication of the prohibitory irritant, and resolute clauses contained in the disposition, it must reasonably be supposed that whoever transacted with Sir Robert must have transacted on the faith that the lands then in his possession were chargeable with his debts.

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The respondent is a *bona fide* creditor, and cannot be held to have known the conditions of Sir Robert Denham's right to the lands ; the deed of entail not having been registered in the proper office, nor the disabling clauses inserted in the retour, which was the only right in virtue of which he possessed.

The register of entails was intended to prevent just creditors being deceived by heirs of entail, as it made them secure if they searched it before contracting ; but the act cannot be construed to mean that just creditors should suffer by the default of an heir (legally possessed of the lands at the time) not complying with the directions of the act ; nor in any case, except where they unwarily transact with an heir of entail who has observed punctually those directions.

Personal tailzies, as well as real, are regulated by the act of parliament, upon which principle alone the appellant prevailed in his action against the heirs of Sir Robert Denham ; and it would be most unequitable to hold that creditors are barred by the same law from recovering their just debts,

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merely on the ground that it related to real and not to personal estates. The act has declared that no entail shall be real and effectual against creditors unless the original deed is registered in the proper office, and the conditions and limitations repeated in the rights and conveyances by which the heirs of entail possess the lands; and as Sir Robert neither registered the entail, nor repeated the limitations in the retour of his service, it is clear that his creditors can affect the lands with his debt, notwithstanding the clauses in the deed, in consequence whereof they descended to the appellant.

Judgment
June 5, 1733.

After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutor of the 23d November 1731, whereby the Lords of Session found 'that the estate of Westshield is still affectable by the pursuer as creditor to the deceased Robert Baillie *alias* Denham,' as also the said subsequent interlocutors complained of in the said appeal, be, and the same are hereby reversed."

For the Appellant, *Dun. Forbes, C. Talbot, Ro. Dundas;*

For the Respondent, *P. Yorke, Ch. Areskine, A. Hume Campbell.*

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LUTWIDGE
v.
GRAY, &c.

THOMAS LUTWIDGE, Merchant in
Whitehaven; and PETER HOW,
Merchant, his Assignee, - - } *Appellants;*
ARCHIBALD GRAY, JOHN BUCHAN-
NAN, and JOHN KING, Merchants } *Respondents.*
in Glasgow, - - - - -

23d February, 1734.

MUTUAL CONTRACT.—AFFREIGHTMENT.—PERICULUM.—Charter party is not dissolved by the loss of the ship. Freight is still due on the part of the cargo which is saved.

A vessel being wrecked, and the freighters having taken possession of part of the goods, and abandoned them to the insurers, —found that the whole freight is due for those goods, and that the freighters are primarily liable.

The ship-master having declined to carry the goods to the end of the voyage in another ship, and the owners of the goods having taken them away, —found that freight *pro rata itineris* is due for these, although they proved to be so damaged as to be quite useless; and that the freighters are primarily liable for it.

[Fol. Dic. II. p. 59. Elchies, voce mutual contract, No. 3. Mor. Dict. p. 10111.]

By charter party between Lutwidge and the respondents, the former became bound to transport a cargo of tobacco from Virginia to Port-Glasgow, at a certain rate per ton, to be paid, one half upon the ship's discharge, and the rest within six months thereafter. No. 26.

The ship was wrecked on the coast of Ireland, and the greater part of the cargo destroyed or much

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damaged. Lutwidge informed the respondents immediately of the disaster, and that he intended to send a ship to transport the remainder of the cargo to Port-Glasgow. The ship was sent, but returned empty, the respondents having previously sent their agent to the spot, to whom that part of the goods which belonged to them were delivered on payment of the salvage, and by whom they were abandoned, and the bills of lading indorsed to the insurers at Bristol.

The remainder belonged to merchants in Glasgow, whose agent it appears paid the salvage, and was willing that the goods should be carried in the ship which had been sent for them, provided that the master would grant bills of lading to deliver at Port-Glasgow or Greenock ; but he declining to do so, or to oblige himself otherwise than by receipts for the goods, binding him to deliver them in Great Britain,* the agent freighted another vessel in which they were conveyed to Glasgow, upon arrival at which place they were destroyed as useless.

1729. The respondents refusing to pay any freight because the ship was lost, an action was brought against them in the Court of Admiralty, and it was found “ that freight was due for that part of the “ cargo which was saved, though damnified, in re- “ spect of the defenders’ intromitting therewith, “ and acknowledging the property ; and that the “ defenders were liable for the full freight of all

* This statement is taken from the respondents’ paper alone, but it would appear from circumstances noticed at the end of this report, that such was held to be the fact on deciding the case.

“ the goods saved, notwithstanding they were not brought by the pursuer’s ship to the port of delivery.”

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The cause was brought by suspension into the Court of Session, where it was found, “ that the contract of affreightment was dissolved by the total loss of the ship, albeit some of the shipwrecked goods were saved out of the shipwreck ; and that the freighters indorsing the bills of lading to the insurers did not subject the freighters to any freight for the goods recovered by the insurers ; but found the merchants liable for the freight, *pro rata itineris*, of such of the goods as were brought to Glasgow, notwithstanding some of the tobacco was found damnified, and burnt there.”

February 12,
1732.

Upon advising a reclaiming petition and answers, the Court “ adhered to their former interlocutors, notwithstanding that the merchants employed an agent to recover and preserve the goods for the behoof of the insurers.”

July 8.

The appeal was brought from “ part of an interlocutor of the 12th February, 1732, and the interlocutor of the 5th July affirming the same.

Entered
Feb. 26, and
March 2,
1733.

Pleaded for the Appellants:—It is an established rule by the maritime law of all nations, that where a ship is lost, and the whole or part of the cargo saved, the contract of affreightment is not resolved, and that the freight is due for so much of the goods as are delivered, seeing it is for delivery of the goods that the payment of freight is stipulated.

In cases of shipwreck, it is in the option of the master of the ship to take his freight *pro ratione*

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itineris immensi, and to be free of further transportation, or to provide another ship to carry the cargo to the port of delivery ; and there is no difference in law, whether the ship be quite lost or so disabled as not to be conveniently repaired. The master is entitled to the full freight of the goods saved, if he bring the goods to the port of delivery in another hired ship, in the same manner as he would have been entitled thereto had the goods been brought by the ship first freighted.

If the goods had been brought in the first ship, freight would have been due upon such parts of the cargo as were even damaged by stress of weather, or other accidents, provided it was not through the fault of the master or mariners ; and the freighters cannot give up part of their cargo, because of less value than the freight, and retain another part which may be in good condition. They must either abandon the whole to the master of the ship or pay the whole freight. An abandonment to the master frees from freight, because it enables him to dispose of the effects ; but an abandonment made to any other person, which authorises that other person to intercept the effects from the master, is properly an assignment ; and with respect to the master, is the same thing as if the proprietor had laid hold of the goods and taken them into his own custody. And although merchants insuring, in order to entitle them to the insurance money, must assign their right in the goods to the insurers, by indorsing the bills of lading ; yet such assignment is only an abandonment to the insurers, not to the master. And the fact of their having made that abandonment effectual, by their

agent's claiming the goods, and conveying them to Bristol for behoof of the insurers, in prejudice of the appellant's right of retention, is the foundation of his claim against them; they having thus enabled the insurers to recover the goods which they themselves had no right to, except upon payment of the freight. They must therefore be liable to the appellant, who was thus by their act and deed, deprived of the security which he had an undoubted right to retain.

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Although the goods were not brought to the port of discharge, yet since the appellant had sent another ship for transporting them, the respondents were answerable for the whole freight, inasmuch as it was only through their refusing to deliver them that they were not brought to the port of delivery.

The appellants are not bound to sue the insurers, or the other merchants at Glasgow with whom they had no contract, but only the respondents, who entered into the charter party, and became therefore bound to pay the freight.

Pleaded for the Respondents:—No freight could be due upon the charter party, the ship having been lost; and even as to that part which was recovered out of the sea, no freight could be demanded either in law or equity, the same having been so damnified that it was useless to the merchant, and could not be admitted to an entry, and therefore was burnt at the scales.

At all events, they could be only liable for a proportional part of the freight for what was saved,

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viz. from Virginia to Youghall in Ireland, and therefore the remainder of the voyage ought to be deducted.

The charter party being dissolved by the loss of the ship, the appellant had only a claim in equity, in so far as the proprietors of the tobacco were profited, and therefore freight ought only to be paid in proportion to the value of the tobacco after deduction of the salvage.

The respondents having abandoned the tobacco to the insurers, as by law they might and were obliged to do, any freight which the appellant could claim, was due by the insurers and not by the respondents; and he had his remedy against the insurers either by action or detention, which would have been competent to him if he would have paid the salvage.

He had no claim upon the respondents for the freight of the tobacco which was not abandoned to the insurers; but his claim, if he had any, would lie against the merchants to whom it belonged.

Judgment
Feb. 23. 1734.

After hearing counsel, " it is ordered and adjudged, &c. That the said interlocutor, and " the affirmance thereof, complained of in the " said appeal, be and are hereby reversed; and " it is hereby declared, that the said respondents are liable for the full freight of such " goods as were given up to the insurers, and " for the freight *pro rata itineris* of such of the " goods as were brought to Glasgow, notwithstanding some of the tobacco was found damaged and burnt there."

For Appellants, *Dun. Forbes, Wm. Murray.*

For Respondents, *Ro. Dundas, Will. Hamilton.*

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In the *Fol. Dictionary*, and in *Morrison's Dictionary*, this case is reported without any notice of the reversal. In *Elchies* it is properly stated, and likewise in *Bell's Commentaries*, I. p. 480. Note. The circumstances are also detailed in *Abbot's law of shipping*, p. 316 (Edit. 1812.)

In deciding the case of *Luke et alii v. Lyde* (Burrow II. 882,) Lord Mansfield, founding upon the present case, (in which he had been counsel) remarked "that it was well considered in the House of Lords, and that Lord Talbot gave the reasons of the judgement of the House at length."

"The House of Lords determined upon these reasons, (delivered by the Lord Chancellor Talbot,) 'That the whole freight was due upon the goods sent to Bristol, because the master offered a ship to carry the goods to Glasgow, which was the port of delivery. But as the master declined carrying the other goods to Glasgow, (the port of their delivery) they determined that as to them, he ought to be paid only *pro rata*, viz. as much as was proportionable to his carrying them to Youghall, the place where the accident happened.' And this was all agreeable to the maritime law."

p. 885.

Lord Mansfield farther says, "it is quite immaterial what the merchant made of the goods afterwards; for the master has nothing at all to do with the goodness or badness of the market; nor indeed can that be properly known, till after the freight is paid; for the master is not bound to deliver the goods, till after he is paid his freight. No sort of notice was taken of that matter in the case of *Lutwidge and How v. Gray*, in the House of Lords; and yet there the tobacco was damaged very greatly; even so much that part of it was burnt at the scales in Glasgow."

p. 890.

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DUKE OF
ROXBURGH

v.

WAUCHOPE.

JOHN, DUKE OF ROXBURGH, *Appellant*;
 JAMES DON, *alias* WAUCHOPE, of } *Respondent*.
 Edmonstone, Esq. -

Et è Contra.

5th March, 1734.

TAILZIE.—Circumstances under which a feu-charter by an heir of entail was reduced as granted *a non habente potestatem*, although power to feu, without diminution of the rental, was given by the entail.

PREScription.—Lands being possessed under a lease, and a feu of the same subsequently granted, it was found that the possession continued to be in virtue of the lease, and that prescription against the right of challenging the feu, commenced only at the expiry of the lease, and not from the date of the feu-charter.

JUS TERTII.—It being objected to the title of an heir pursuing a reduction of his ancestor's deed, as a contravention of the entail, that the contravention implied the forfeiture of his own right,—the objection was repelled as being *jus tertii* to one who did not claim under the entail.

- No. 27. THE entail of the earldom and estate of Roxburgh contains the following clause; “Reserving always to the said heirs of entail, liberty and privilege of granting feus and rentals of such parts and portions of the said estate as shall seem expedient to them, provided the same shall no ways be granted in lesion or diminution of the rental of the lands and others aforesaid, as

“the same shall happen to pay at the time of the succession of the said heir to the same.”

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DUKE OF
ROXBURGH
v.

WAUCHOPE.
Dec. 31, 1649.

Earl Robert, the maker of this entail, granted to Alexander Don, in consideration of his services, a lease of certain lands for the term of his lifetime, and nineteen years after his death, at the yearly rent of L.6 Scots. The lease recited that “the Earl had formerly granted to Mr. Don a bond for 500 merks yearly pension for life; and that the lands were charged with certain annuities which Mr. Don became bound to clear.” It provided that Mr. Don “did accept of the said lease in satisfaction of the said pension; and that the lands should be redeemable by the Earl, his heirs or assignees, upon payment of 10,000 merks.” It was likewise provided that at the expiry of the lease he should be allowed the expenses, not exceeding the sum of 2000 merks Scots, of repairs upon buildings, &c.

Earl Robert was succeeded by Earl William, May 14, 1650. who shortly afterwards granted to Mr. Don a feu charter of the same lands, for the yearly feuduty of L.7, 10s. Scots; upon which infestment followed.

After the death of Earl William, an action was raised in 1685 by his son, for the purpose of setting aside this conveyance, but it was not proceeded in.

In 1727 the Duke of Roxburgh brought an action for having it declared that the lease was expired,—Alexander Don the lessee having died in 1687; and that the conveyance and feu-charter were

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void and null, having been granted by one who, by the entail, was disabled from making any alienation of the estate.

In defence it was objected to the title of the Duke, that if the grant of the feu-right in question should be construed a contravention, it would, by the express words of the entail, create a forfeiture of the right of the Duke, who was the male heir of the granter, and possessed the estate as such. Besides this, by the entail, express powers are given to grant feus of the lands, if the yearly profit is not thereby diminished from what it was at the time of the succession opening to the granter, and by the feu in question the rent had been increased. It was farther pleaded that the action was barred by prescription, the defender and his ancestors having possessed for above 40 years.

To the objection to the title, the Duke answered, that it was *jus tertii* to the defender, who could have no right to profit by the contravention. He farther maintained, that the feu-duty stipulated to be paid was not adequate to the profits of the lands, and was an elusory and not a real rent. As to the defence of prescription, he answered that the action which was brought in 1685 was a sufficient interruption of the course of the prescription, and even although that action had not been raised, still Mr. Don, having entered to possession by virtue of a lease, which is no foundation for the plea of prescription, could not, although he afterwards obtained a feu-charter, alter or change the title of his possession, until the lease expired; and therefore prescription necessarily requiring posses-

sion upon charter and seisin, it could not commence until the termination of the lease.

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v.

WAUCHOPE.
July 21, 1732.

The Lord Ordinary "repelled the objection to the Duke's title, and sustained the same;" and having reported the other points to the Court, their Lordships found, "that the prescription propon-
"ed for John Wauchope the defender, commenc-
"ed from the date of the charter in the year 1650,
"and not from the date of the tack, but found the
"said prescription interrupted by the process rais-
"ed in the year 1685, and found that William,
"Earl of Roxburgh, had sufficient powers to
"grant the said feu-charter and disposition; and
"therefore repelled the reason of reduction of
"the said charter and disposition, as granted *a non*
"*habente potestatem*."

Dec. 19.

An appeal was brought by the Duke, from that part of this interlocutor, which finds that the prescription commenced from the date of the feu-charter in 1650, and not from the expiry of the lease; likewise from that part which finds that Earl William had sufficient powers to grant the said feu-charter and disposition.

Entered
Jan. 26, 1733.

A cross appeal was brought by Mr. Wauchope, April 9, 1733. from the interlocutor of the 21st July, repelling the objection to the Duke's title to pursue; and also from that part of the other interlocutor which finds that the prescription is interrupted by the process raised in 1685.

ON THE ORIGINAL APPEAL.

Pleaded for the Appellant:—1. As Earl Wil-

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liam had no powers to alienate any part of the estate, the power reserved to grant feus or leases without diminution of the rental, could never be applied to the present case, where the lands were given away on account of services, but not let for what could properly be called a rent, but only an elusory acknowledgment. It is evident that the ten shillings (L.6 Scots) payable by Alexander Don, was not the rule at which the heirs of entail were at liberty to feu the land; for as the 10,000 merks payable for redeeming the lease, and the 2000 merks allowed for repairs and buildings, were to bear no interest during the term of the lease,—as Alexander Don was bound to clear off the annuities payable out of the lands, and to release the pension of 500 merks due to himself for life,—a discharge of these incumbrances must be construed as an equivalent and consideration in place of so much rent, over and above the nominal rent of ten shillings.

2. Supposing that the heir of entail had power to grant a feu for a feu-duty of no greater extent than the rent contained in the lease from Earl Robert, yet he could not release the casualties which attend the right of superiority, and which would be more beneficial to the succeeding heir of entail, than this rent stipulated; for such release would be directly contrary to the nature of a feudal right, by which the superior is entitled to all the usual casualties. The power to grant feus cannot be otherwise understood than of *proper* feus, attended with the usual casualties and profits arising from the nature of a feu.

3. The prescription cannot be counted but from the expiry of the lease ; because,—Alexander Don having only a temporary right by lease, in virtue of which he held the lands as tenant to Earl Robert,—when he obtained the feu from Earl William, he could not by the law of Scotland invert that possession during the currency of the lease, and acquire a right of property in prejudice of his right under the lease, and in prejudice of the heirs of entail. During the continuance of the lease every heir of entail was under a disability of proceeding against him with any effect ; for during that time he could not possibly remove the lessee from possession ; and as no prescription can take place against an action, but from the time at which such action could have been effectually instituted, there is no room for it in the present case.

There was no homologation. The receipts were granted by the heir's steward, and although the sum was in them erroneously called a feu-duty, it was not the exact sum specified in the charter. Such receipts can never be construed into an approbation of the title, as has often been adjudged in similar cases.

Pleaded for the Respondent:—1. Restrictions cannot by construction be extended beyond the words of the deed, and there is here no restraint upon the power of feuing, except in the proviso that the rent or feu-duty should not be diminished “prout tempore successionis dict. hæredum it-
“dem persolvere contigerit.” No greater rent had ever been paid out of these lands than L.6 Scots, and therefore the feu-duty of L.7, 10s. was

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a higher rent than what was payable to the heir upon the opening of the succession; neither can the yearly pension and liferents be accounted any part of the rent, because the liferents determined with the life of the liferenters, and the pension with that of Alexander Don, and the lease was to subsist for nineteen years after his death, yet no more was to be paid in these events than the above rent. That rent had been fixed by the maker of the entail, and therefore could not by any heir claiming under his deed, be objected to as elusory, especially as Earl Robert could not be ignorant that the lands were of greater value, the lease reciting the other considerations for which it was granted.

2. The prestations to the superior may be, and commonly are regulated *pactis et provisionibus hominum*, and therefore the power of feuing being limited only to the effect that the rental should not be diminished, the releasing certain casualties payable by some feuars to their superiors, was not inconsistent with that power. Besides, these casualties were only released during the lifetime of Alexander Don.

3. Nothing is more certain than that every landlord or tenant may, by agreement between themselves, change the nature of the tenant's possession, and that the landlord may grant, and the tenant accept, in lieu thereof, any new deed which the landlord has the power to execute.

The heir of entail had a power to redeem the lease, and therefore cannot be said to have been *non valens agere*. Moreover, during the subsistence

of the lease, he might have brought an action of reduction of the feu-charter, of which he could not be ignorant, because the infestment was upon record, and the acquittances granted yearly referred to it, the rent being paid from the year 1650 according to it, and not according to the terms of the lease.

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ON THE CROSS APPEAL.

Pleaded for the Appellant, (Mr. Wauchope):—

1. If this feu-charter was a contravention of the entail, the necessary consequence of it, by the very words of the entail, was a forfeiture of the right of the granter and all his issue; and therefore the Duke, who claims as heir of the body of the granter so forfeiting, had no title whatever to carry on any suit concerning the lands entailed, or any part of them.

2. It appears, that in the action of improbation, in the year 1685, to which Sir Alexander Don with many other persons were made parties, no particular writing is specially mentioned in the summons; and it is a settled point that no action can interrupt prescription, unless not only the title is particularly called for in the summons, but also the objection libelled, of which the pursuer could avail himself. Here no reason of reduction was libelled, except that of falsehood, which is perpetual in its own nature, and on which the Duke does not now insist.

Pleaded for the Respondent, (the Duke):—

1. The objection to the title is *jus tertii* to Mr. Wauchope, being competent only to an heir of

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entail, but not to a third party; and even supposing it had been made by an heir of entail, it would now be barred by prescription, no heir having pretended to take advantage of it for upwards of forty years, during which the descendants of Earl William have enjoyed the estate without challenge in virtue of their retours as heirs of entail to each other.

2. The prescription was interrupted by the action brought against Mr. Wauchope's ancestor in 1685, the object of which was to void and set aside his title to the lands, and in which several proceedings were had. Since that time the minority of the Duke excludes the plea.

Judgment
March 5, 1734.

After hearing counsel, " it is ordered and adjudged, &c. that such parts of said interlocutor of 19th December, 1732, whereby the Lords of Session found that the prescription proposed for the defenders commenced from the date of the charter, anno 1650, and not from the ish of the tack; and that William, Earl of Roxburgh, by the tailzie had sufficient powers to grant the feu-charter and disposition in the appeal mentioned, and therefore repelled the reason of reduction, proponed for the pursuer, of the said charter as granted *a non habente potestatem*, and of the said disposition, be, and is hereby reversed; and it is hereby further ordered, that the cross appeal of the said James Wauchope, be, and is hereby dismissed, without prejudice to the question relating to the interruption of the prescription when a proper case shall come before this House; and it is further ordered and adjudged,

“ that the said interlocutor of the Lord Ordinary
“ of the 21st July, 1732, be, and is hereby affirm-
“ ed ; and it is hereby declared that the prescrip-
“ tion pleaded for John Wauchope, the defender,
“ commenced from the termination of the lease,
“ and not from the date of the charter, and that
“ William, Earl of Roxburgh, by the entail, had
“ not sufficient powers to grant the feu-charter and
“ conveyance.”

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For Appellant, *P. Yorke, Ro. Dundas, Wm.
Murray.*

For Respondent, *Dun. Forbes, C. Talbot, Ch.
Areskine.*

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ANDERSONS

v.

ANDERSONS.

THOMAS ANDERSON, the Elder, an
Idiot, by William Chatto, Writer,
his Curator; and THOMAS AN-
DERSON, the Younger, Eldest Son
of the said THOMAS ANDERSON,
Paupers, - - - - -

} *Appellants;*

ISABEL ANDERSON and JOHN BULL,
her Husband; WILLIAM COUTTS,
Husband to the Deceased ELIZA-
BETH ANDERSON, and ROBERT
GEDDES, their Assignee, - -

} *Respondents.*

13th March, 1734.

PROVISION TO HEIRS AND CHILDREN.—CONSTRUCTION—In a marriage contract, a sum of money being provided to the husband in liferent, and the eldest son of the marriage in fee, and a portion being settled on the daughters, to be paid on their respective marriages,—it was found that the father was obliged to pay the same to the daughters upon becoming due, notwithstanding there would not be left sufficient funds for payment of the provision to the eldest son.

It was found that the son had no interest to dispute this claim, and that he was not entitled to be ranked *pari passu* with the daughters on the funds of the father.

It being provided, that, in the event of there being *three* daughters of the marriage, a certain sum should be paid among them according to specified proportions; and there being born *four* daughters,—it was found that the fourth daughter was not entitled to any share of that sum, although no other provision was made for her.

No. 28. THOMAS ANDERSON, the elder, in his marriage settlement, became bound to secure upon lands or annual rents the sum of 30,000 merks in favour of

himself in liferent, and the eldest son of the marriage in fee, which failing, to himself, his heirs and assignees whatsoever. The deed also contained the following clause : “ And in case there should “ happen to be only one daughter of the said marriage, he obliged him, his heirs and executors, to “ content and pay to her, her heirs and assignees, “ the sum of 18,000 merks ; if two daughters, the “ sum of 20,000 merks, whereof 11,000 to the “ eldest, and 9000 to the youngest ; and if three “ daughters, the sum of 30,000 merks, whereof “ 12,000 to the eldest, 10,000 to the second, and “ 8000 to the youngest, payable within year and “ day next after their respective marriages.”

1734.
ANDERSONS
v.
ANDERSONS.

There was issue of the marriage, two sons and four daughters.

The eldest daughter Isabel having married, an action was brought by her and her husband against her father for 12,000 merks, as her portion under the marriage contract. It was pleaded in defence, that by the marriage contract, only 30,000 merks altogether were to be settled, and there being a son to whom this sum was first provided, the daughters could claim nothing under the contract. The Lords “ found that the provisions to the daughters “ did take place, and were effectual to them, though “ there were sons, one or more of the marriage, “ providing the effects of Mr. Thomas Anderson, “ the father, were sufficient at the time of the marriage to satisfy both the 30,000 merks provided “ to the three daughters, and the 30,000 merks “ which he was to secure to himself in liferent and “ the eldest son in fee.”

1721.

February 13,
1722.

1734.

ANDERSONS
v.
ANDERSONS.

Various proceedings followed, which it is unnecessary to detail; and also in similar actions severally brought by the three other daughters.*

Thereafter, Thomas, the younger, who had been a minor during these processes, and no party to them, brought an action of reduction and declarator to have the several decrees pronounced therein reduced, and to have it declared that the sum of 30,000 merks was provided and secured to the eldest son of the marriage, and that the provision to the daughters, as it was made subsequently to that in favour of the son, was not to commence or have effect, but upon failure of issue male.

In defence, it was stated for the daughters, that Thomas, the younger, had no title to quarrel the decrees pronounced in their favour, because the only interest he had by the marriage settlement, was to take 30,000 merks provided to be secured to his father in liferent and himself in fee, to which sum, as it devolved on him only at his father's decease, and was subject to his father's power, he had no pretence of right till after his father's death; and therefore he could not maintain any action to set aside judgments obtained by the daughters for securing por-

* In the action raised by the youngest daughter, for whom no specific provision was made in the marriage contract, it was found (31st July 1729) that she was entitled to a proportional share with her sisters of the 30,000 merks provided to the daughters of the marriage. And by a subsequent interlocutor (18th November 1729,) the Court adhered, and decreed the other sisters to pay back to her the proportion of what they had received, so as to make her share 4500 merks. These judgments were reversed under the present appeal. The decision of the Court of Session upon this point is reported, (Fol. Dict. I. p. 441, Mor. Dict. p. 6590,) but without any notice of the reversal.

tions that fell due many years before. But even supposing that he had a title, he would be excluded by these judgments, which formed so many *res judicatæ*, deciding the question in point.

1734.
ANDERSONS
v.
ANDERSONS.

It was answered, that nothing determined by these decrees could be looked on as *res judicata* against him, who had been no party to the suits, and likewise a minor at the time. And as the provision for the eldest son of the marriage would be entirely disappointed, he ought not to be concluded thereby; especially since it was certain that at the time of the decrees, the fund of payment was only sufficient to answer one sum of 30,000 merks, so that the eldest son of the marriage would have nothing.

It was replied, that Thomas, the son, could not properly have been a party to these actions. Thomas, the father, was the only person bound by the marriage contract, and against him alone could the claim have been brought. The decrees, therefore, which were regularly obtained, would have operated as *res judicatæ* against him were he endeavouring to set them aside, and they must have the same operation against every other person who will make use of any argument that was competent to him, and contend that the obligation on him was not so extensive as the Court has found it to be.

The Lords found "that Thomas, the son, had a July 13, 1731.
"title to insist in the reduction, reserving to their
"determination the exception of *res judicata*."

They afterwards found, "that he was barred December 1,
"from quarrelling the decree in favour of his eldest 1731.
"sister, and Robert Geddes her assignee *exceptione*
"*rei judicatæ*."

1734.

ANDERSONS
v.
ANDERSONS.

In a petition against this interlocutor, it was pleaded, that it being manifest that the interest of the heir male of the marriage was as much intended to be secured as that of the daughters, and it being certain that the funds could *now* answer no more than 30,000 merks, equity required that he and the daughters should have alike, and that the daughters ought to be decreed to restrict their demands to one half of the 30,000 merks, so that room might be left to him to recover at least one half of what had been provided to him.

As the father was only bound to provide one specific sum of 30,000 merks, it is evident that the provisions to the daughters were only intended in case of failure of issue male. But even supposing that *two* sums of that amount had been payable by the marriage contract, it could never be the intention that in any case the daughters should be paid their whole portions, while the son, who was the person principally in view in making the contract, should have nothing. The supposition is, that the father was at the time of the marriage in possession of an estate of 60,000 merks; but as this estate has, before these provisions became payable, been diminished by one half, it is clear that the sums due to the children ought to be diminished respectively according to their original proportions, and not one class be preferred for their whole provision to the entire exclusion of the other. Neither should the decrees obtained by the daughters bar the infant son, since they can affect thereby only the proportions due to them.

To this it was answered, that the provisions were in very different circumstances; those to the daughters were payable at particular days, long since elapsed; and they were entitled at these days to all action and execution against their father for making them effectual; whereas that to the son was not exigible till the father's death; and could be taken then only by way of succession, if the father had so much property free of debts; so that, the father being still alive, it was not competent for the son to make any demand against the daughters for contribution.

1734.
 ANDERSONS
 v.
 ANDERSONS.

But supposing the son was a creditor for this provision, and that it was not pendant either on the death or deeds of his father, still he and the daughters would be at best only *personal* creditors for separate and distinct sums. None of them are a real lien on the father's estate, which is only subject to be affected by proper diligence, and the daughters having used such, while the son has not, they have thereby established a legal and equitable preference. In consequence of this and of the former decrees, these portions have become the subject of marriage settlements, and other onerous transactions, which would be entirely frustrated if the present claim were to be sustained.

The Lords found "that it was competent for January 22,
 " Thomas, the son, to claim a share *pari passu* 1732.
 " with his sisters, but found the diligence used by
 " the sisters gives them a preference."

A petition against the last part of this interlocutor was refused. June 30.

1734.
 ANDERSONS
 v.
 ANDERSONS.
 Entered
 Jan. 31, 1734.

The appeal was brought from the interlocutors of the 13th February, 14th July, and 13th November 1722; the 31st July 1725, the 24th January 1728; 31st July, 18th November 1729; 1st December 1731, the 22d January, and 30th June 1732.

Judgment
 March 13,
 1734.

After hearing counsel, "it is ordered and adjudged, &c. that the latter part of the said interlocutor of the 13th February 1722, in these words (*videlicet*), 'providing the effects of the said Thomas Anderson, the elder, were at the time sufficient to answer and satisfy both the 30,000 merks provided to the daughters, and the 30,000 merks which he was to provide and secure to himself in liferent, and the eldest son in fee;' as also the said interlocutors or decrees of the 31st July, and 18th November 1729; the interlocutor of 13th July 1731, finding 'that Thomas Anderson, the son, had a title to insist in the reduction;' and the interlocutor of the 22d January 1732, finding it competent to the said Thomas to claim a share *pari passu* with his sisters; be, and the same are hereby reversed; and it is further ordered and adjudged, that so much of the said interlocutor of the 13th February, as is not hereby reversed, and the several subsequent interlocutors or decrees not hereby reversed or varied, be, and the same are hereby affirmed."

For Appellants, *D. Ryder, A. Hume Campbell.*
 For Respondents, *Dun. Forbes, Ro. Dundas,*
W. Murray.

1734.

RICHART

v.

HOPETOUN.

JAMES HEPBURN RICHART of Keith, *Appellant*;
CHARLES, EARL of HOPETOUN, *Respondent*.

5th April 1734.

TAILZIE.—A prohibition, with irritant and resolute clauses against charging the estate with debt, found not to disable from selling.

SIR ROBERT HEPBURN of Keith settled, under No. 29. the burden of all his debts, the lands of Keith and Paistoun, by an entail containing strict prohibitory, irritant, and resolute clauses against contracting debts, and charging the estate therewith, but no express prohibition against alienating the lands or any part of them.

Robert Congaltoun, possessing under this deed, sold to the Earl of Hopetoun the lands of Paistoun, (the price of which appears to have been in part applied in payment of the entailer's debts.) On Robert's death, the appellant, having made up titles as heir of entail, raised an action of reduction for setting aside this disposition, as being in defraud of the entail, and granted by a person disabled from alienating by clauses inserted in his own title.

The cause being reported by the Lord Ordinary, the following interlocutor was pronounced: "The February 15, 1732.
" Lords having considered the entail libelled, and
" that it contains no clause disabling the heirs of
" entail to dispoise the lands therein contained;
" find that they might lawfully dispoise or sell the

1734.

RICHART

v.

HOPETOUN.

Entered
January 18,
1734.

“lands for onerous causes, and assoilzie the defender from the reduction, and decern accordingly.” A reclaiming petition was refused.

The appeal was brought from these interlocutors of the 15th and 17th February 1732.

Pleaded for the Appellant:—The scope and intention of a settlement ought to be observed by heirs claiming under it. The entailer disabled the heirs of entail from charging the estate with debt for no other reason than that the several heirs might take the lands without being diminished in their value; and therefore it is quite unreasonable to suppose that he should have left them at liberty to alienate the subject.

Had Robert granted a wadset of the estate for debts contracted by him, he would, according to the scope of the settlement, have forfeited his right, and the security so granted by him could have been set aside by the appellant. If, however, he could not grant a right, with an equity of redemption in favour of the heir of entail, it would seem absurd to hold that he could alienate, absolutely and without redemption.

Pleaded for the Respondent:—Restraints upon property, being contrary to the nature of a fee, and to the common law of the land, and a great incumbrance upon commerce, are never to be presumed, where there are no express words by which they are plainly, and without implication, imposed. Such a construction would only prove a snare to purchasers, who transact on the faith of there being no other limitations of the heir's right than what are expressly set forth in the title.

The estate, notwithstanding the entail, remained

subject to the payment of the entailor's debts ; and therefore it is reasonable to suppose that he forbore to restrain his heirs from alienating, with an intention that they might, by sale of part of the lands, be enabled to discharge the burden of debts put upon them.

The heirs of entail are only disabled to charge the lands with their own proper debts, but not to burden it for the debts of the entailor ; and probably he was of opinion that heirs might be more easily prevailed upon to incumber than to alienate their estate ; and therefore restrained them only in that respect ; at all events, by the deed, the heirs are not restricted from selling for valuable considerations ; and therefore the respondent having purchased *bona fide*, and paid the price, he holds and enjoys the estate even by the will of the maker of the entail. It was his will to put on one restraint and not another ; and what he has actually expressed, is the only rule by which the power of the heir over the estate can be measured, who, in virtue of the fee conveyed, has the full exercise of the property in so far as he is not expressly restrained.

After hearing counsel, " it is ordered and adjudged, &c. that the appeal be dismissed, and that the said interlocutory sentences or decrees therein complained of be affirmed."

1734.
RICHART
v.
HOPETOUN.

Judgment
April 8, 1734.

For Appellant, *Dun. Forbes, Al. Hume Campbell.*

For Respondents, *Ch. Areskine, Ro. Dundas.*

1734.

BREADAL-
BANE
v.
MENZIES,
&c.

JOHN, EARL of BREADALBANE, - *Appellant*;
JAMES MENZIES of Culdres, Esq.
and ANGUS M'DONALD, of Ken- } *Respondents.*
nock, - - - - - }

29th January 1735.

FOREST.—In a question between the heritable keeper of a Royal Forest and the neighbouring heritors, regarding the boundaries of the forest, the King's Advocate must be made a party.

No. 30. THE Earl of Breadalbane being heritable forester and keeper of the Royal Forest of Mainlorn, and the respondents proprietors of the adjoining barony of Glenlyon, a question arose regarding the boundary of the forest. Mutual actions of declarator were raised, and after a proof and various proceedings, the Lords found that “the tops of the high hills, where wind and weather sheers, are the marches of the controverted grounds betwixt the barony of Glenlyon, and the forestry of Mainlorn.”

Entered
Jan. 22, 1734.

The appeal was brought from this and other interlocutors.

Jan. 29, 1735. “Counsel were called in to be heard in the cause; and it appearing, that no person on behalf of his Majesty was a party to either of the suits commenced before the Lords of Session in Scotland;”

" It is ordered and adjudged, &c. that the two
 " interlocutors complained of be, and are hereby
 " reversed : And it is hereby further ordered, that
 " the appellant and respondents be respectively at
 " liberty, either to commence new suits, and make
 " his Majesty's Advocate, on behalf of his Majes-
 " ty, a party thereto ; or to make his Majesty's
 " Advocate, on behalf of his Majesty, a party to
 " the suits above mentioned ; and thereupon to
 " proceed therein as they shall be advised."

1734.

**BREADAL-
 BANE
 v.
 MENZIES,
 &c.**

Judgment.

For Appellant, *Ro. Dundas, J. Strange, J.
 Taylor.*

For Respondents, *Dun. Forbes, W. Mur-
 ray.*

The above objection originated with the Court. In a manuscript
 note upon the papers belonging to J. A. Murray, Esq. it is said that
 " Inquiry being made in relation to the Court of Session in Scotland,
 " whether they determine the boundary of a forest without the King
 " being a party," the counsel were heard upon the subject.

1735.

HOGGAN
v.
WARDLAW,
&c.

JOHN HOGGAN, Provost of the Burgh } *Appellants;*
of Kinghorn, *et alii*, - - - - }
WILLIAM WARDLAW, Colonel JAMES } *Respondents.*
ST. CLAIR, *et alii*, - - - - }

10th March 1735.

PACTUM ILLICITUM.—MEMBER OF PARLIAMENT.—A bond entered into by a portion of a body of electors, binding themselves to vote according to the opinion of the majority of their number, found to be *contra bonos mores* and illegal. The election following thereon annulled.

BOROUGH ROYAL.—The sett recorded in the books of the Convention of Royal Burghs must be adhered to, notwithstanding that previous contrary practice be alleged.*

- No. 31. By the sett of the burgh of Kinghorn, it is appointed, “ that the council shall consist of merchants, tailors, and brewers, to the number of seventeen, and of five deacons; that annually, upon Monday before Michaelmas, the said council of twenty-two shall choose six new councillors in the room of six who go off; that upon Wednesday immediately after Michaelmas yearly, the old and new councillors and deacons shall choose the provost and two baillies, and that

* Both of these points are insisted on in the arguments; but it would rather appear that the judgment went on the former, under which head the decision of the House of Lords is founded on as an authority in the case of Patison, &c. v. Magistrates of Stirling, 1st March 1773, Fac. Col. No. 166, Mor. p. 9527.

“out of the council and deacons the treasurer
“shall be chosen at Martinmas yearly.”

1733.

HOGGAN
v.
WARDLAW,
&c.

In order to secure a preponderance in the election, a bond was entered into and signed by thirteen of the councillors, by which “they all, with
“one advice and consent, bound and obliged
“them, conjunctly and severally, each under the
“penalty of 500 merks, and of being esteemed infamous and unfit for society, to act in concert
“with one another, and give their votes plum at
“the election of the magistrates of the said burgh,
“to be on Wednesday next the 4th October, to such
“persons as the major part of them should think
“most worthy of the office of magistracy, till the
“next election at Michaelmas 1733, and then to vote
“with one another for such persons as they, or the
“major part of them, should think proper to succeed in the magistracy, and in the council, for
“the good and benefit of the burgh.”

At the meeting preceding Michaelmas 1733, for the election of new councillors, a dispute having arisen between two parties, they separated, when Hoggan (the appellant) then provost of the burgh, and his adherents, made choice of six new councillors, and the other party also made an election, but only chose three. At the election of magistrates a like separation took place; Hoggan being chosen provost by one party, and Wardlaw (the respondent) by the other.

Each party raised an action of reduction and declarator, for reducing the election of their opponents, and declaring their own right.

1734.
 HOGGAN
 v.
 WARDLAW,
 &c.
 In the action at the instance of the respondents, the appellants first stated in defence, that an unlawful confederacy had been entered into by the respondents, which was sufficient to annul the election.

January 3,
 1734.
 The Lords found that "the bonds produced are "*contra bonos mores*, unwarrantable and unlawful." But by subsequent interlocutors they found, "that the bonds produced are not *per se*, relevant to annul the election of Provost Wardlaw, and other magistrates chosen with him in "1773."

January 26,— It was next objected that the election of the respondents was contradictory to the sett of the burgh, inasmuch as they had changed no more than three of their councillors, whereas by the sett they ought to have changed six. The Lords found that the objection proponed for the defenders (appellants) are not sufficient to void and annul the election of the pursuers, magistrates and councillors of the burgh of Kinghorn, at Michaelmas last, for the year now current, *in toto*, and remitted to the Lord Ordinary to proceed accordingly."

February 1,— It was farther objected that the two bailies, Miller and Wilson (respondents) were incapable of acting as magistrates, by reason of their being subscribers of the foresaid association; but the Lord Ordinary found, that in respect of the interlocutor of the whole Lords, the exception against the bailies was not sufficient, *per se*, to annul the election.' Other objections were stated, which

were not founded on in the appeal. Upon a reclaiming petition, the Lords 'adhered to their 'former interlocutors.'

The appeal was brought from the interlocutors of the 4th, 15th, and 26th January, and the 1st, 6th, and 8th February 1734.

1735.

HOGGAN

v.

WARDLAW,

&c.

Entered
February 8,
1734.

Pleaded for the Appellants :—1. The election of such of the respondents as pretend to have been elected councillors on the Monday before Michaelmas is null, because the electors were not a quorum of any sort, and acted without the concurrence of any magistrate, which has been adjudged to be absolutely necessary. And the election of magistrates was illegal, because made by councillors unduly chosen, and by only half the number of new councillors which the sett of the burgh requires.

Amended
Feb. 17, 1735.

2. The sett recorded in the books of the convention of Royal Burghs, and in the town books of Kinghorn, in the 1710, is the only rule whereby to judge of the constitution of the burgh, and is a law which the corporation itself can never alter, neither have they attempted to do it. The minutes of every election begin with a reference to it, viz. 'this being the day appointed by the sett of this burgh, &c.' And though it may be true, that, as against the crown, a corporation cannot give itself a constitution, which is not strictly warranted by prescription and immemorial usage, yet they are themselves barred from claiming franchises in a different manner from that in which they have set them on record, or have in any solemn way consented to their being fixed.

1735:
 HOGGAN
 v.
 WARDLAW,
 &c.

In almost all the royal burghs of Scotland the elections have, ever since the Union, proceeded on the footing, and according to the tenor of the setts recorded in the books of the convention of royal burghs ; and the breaking in upon those setts, so recorded and acquiesced in, would manifestly shake loose the foundations of all elections in time coming, and make their proceedings arbitrary and dependent on the humours of the magistrates for the time. In the present case, the respondents do not oppose any other fixed constitution to this sett, but only that which, being altogether uncertain and arbitrary, suits better with the purposes of their association.

3. Even if the respondents had not gone contrary to the sett, yet their election is null and void, because it was carried on by immoral and illegal means. The voters were not free agents, but under the influence of a bond, by which they engaged in effect to submit their own consciences and the rights and interests of the burgh, to the pleasure of the majority of their own number, and thereby invested that small proportion of the corporation with the whole power of the burgh. But the judgment of the Court of Session seems quite inconsistent, they having by one interlocutor found the bond immoral, unwarrantable, and illegal ; and nevertheless by another have found that such a bond was not sufficient to void an election carried on directly in consequence thereof.

*Pleaded for the Respondents:—*1. If the election was carried on without the presence of the magistrate, it was owing solely to the fault of the

appellants, who, being a minority of the town council, thought proper, after the meeting had commenced, to withdraw from the council house. It is in vain for them to pretend that when they so withdrew they required the other councillors to go along with them to a tavern; for if they had been willing that the other councillors should concur with them, they ought to have remained in the proper place at the council board, and finished the business of the day.

1736.

HOGGAN
v.
WARDLAW,
&c.

2. There is no original or legal sett, by charter or otherwise, of the borough extant. Such sett could only flow from the authority of the crown in charters of erection or confirmation, or be introduced by prescription or constant and immemorial custom; but that upon which the appellants found, is only a sett pretended to have been established and sent to the convention of royal boroughs in 1710, and has no authority from the crown, from prescription, or from immemorial usage. On the contrary, since 1710, it has not been in observance hardly in one article on which the objection is founded; for the number of new councillors has been various and ambulatory; and in the period of twenty-three years it has not happened in more than three or four instances at most, that the precise number of six new councillors has been chosen.

As this pretended sett is only entitled, 'Report of a Sett,' and indeed could be nothing else, even supposing it has justly stated the customs of the borough, because neither the council of the borough, nor the convention of royal boroughs, have autho-

1786.

MOGGAN
P.
WARDLAW,
&c.

rity to make a sett; it could have no force, but in so far as it truly related the former usages of the borough. When these were examined into, and the council-books searched, it appeared that the "Report" was erroneous, and not warranted by the former precedents.

3. The respondents entered into concert without any compulsion, as well as without any reward or corrupt view; and their act amounts to no more than a resolution taken voluntarily, that they would act jointly, in making choice of such persons as they should judge most proper and fit for the service of the borough. It is usual in elections to enter into previous concerts for avoiding divisions, and procuring unanimity, and if such concert can lawfully be made *viva voce*, by which the parties are in honour no less engaged than if they gave it under their hands, it cannot much alter the case that the same is reduced to writing, to serve as a memorandum of what has been agreed upon. As to the penalty annexed to the obligation, if it was *contra bonos mores*, it could produce no action or diligence; and as to the other objection of infamy, it imports no more than that parties are bound in honour to observe that which they have agreed to,—an obligation which is implied in every verbal concert or engagement. Therefore neither the penalty nor the infamy adjoined can affect the present question.

It did not appear in the Court below, that the bond had any influence upon these elections, by any previous meeting to discover the opinion of the plurality of those who signed it, all having

freely, and of their own accord, voted for the persons elected at Michaelmas 1733; and, therefore, although entering into the bond should be held in strictness illegal and unwarrantable, still it cannot affect the election to the prejudice of the burgh.

1734.

HOGGAN
v.
WARDLAW,
&c.

After hearing counsel, 'it is ordered and adjudged, &c. that the said several interlocutors complained of be reversed; and it is hereby declared, that the election of the respondents to be magistrates and councillors of the said borough of Kinghorn is null and void,—and that the said respondents be at liberty to proceed before the Lords of Session, upon that part of the libel which calls in question the election of the appellants as they shall think fit.'

Judgment
March 10,
1734.

For the Appellants, *Ro. Dundas, W. Murray.*

For the Respondents, *Dun. Forbes, J. Strange, J. Taylor.*

1735.

ROXBURGH

v.

KERR, &c.

JOHN, DUKE OF ROXBURGH, - - *Appellant*;
 CHRISTIAN KERR of Chatto, and
 CHARLES KERR, Esq. her hus-
 band, and Captain WILLIAM } *Respondents.*
 ELLIOT of Wells, - - - }

18th March 1735.

TAILZIE.—An estate was held under a strict entail against contracting debt, or doing any deed whereby it might be evicted, but with power to the heirs to burden it with the entailor's debts. In security of some of these debts, proper wadsets were granted over a part of it, and the heir afterwards executed a bond of eik in favour of the creditor upon his becoming bound to relieve him of certain other of the debts. It was found that the bond was not *ultra vires* of the heir, and that a decree of apprising proceeding upon it, by which the lands had been carried off, was not struck at by the entail.

- No. 32. ROBERT, Earl of Roxburgh, after the death of his only son, Henry Lord Ker, settled his whole estate upon Sir William Drummond, youngest son of the Earl of Perth, (on condition that he should marry Lord Ker's eldest daughter,) and upon the issue male of that marriage, and several substitutes; under strict prohibitions and irritancies against alienating the estate, or burdening it with any other debts than those of the entailor, which were excepted by the following clause: /“ Necnon reser-
 “ vando potestatem ante dictis heredibus dictum
 “ statum et patrimonium cum quibuscunque sum-
 “ mis monetæ vel debitis debendis per prefatum

“ Robertum, comitem de Roxburgh, tempore sui
 “ decessus, quæ per ejus bona mobilia non solven-
 “ tur modo prescripto per illum in novissima ejus
 “ voluntate, *onerandi*.”

1735.

ROXBURGH

v.

KERR, &c.

Earl Robert's debts being very considerable; Andrew Kerr, (ancestor of the respondent, Christian,) and other friends became bound for him to a great extent during his lifetime. After his death, the creditors pressing for payment, Earl William granted two proper wadsets over certain parts of the estate; the one in 1655, in favour of John Scott of Langshaw, by whom it was shortly after assigned to William Kerr, then an infant, (father of the respondent, Christian Kerr;) and the other, dated in 1658, in favour of the above Andrew Kerr, father of the said William.

Of the same date, a bond of eik was executed, whereby, on a recital of the above two wadsets, and that Andrew Kerr was bound as cautioner for Earl Robert in a farther sum of 22,500 merks, and had undertaken to pay off and relieve Earl William of that sum, and also of the sum of 5000 merks which he had borrowed for the purpose of paying other debts of Earl Robert, the Earl became bound to pay to Andrew Kerr, or William his son, the whole amount of 27,500 merks, at Whitsunday 1659; and for their further security, charged the lands included in both the wadsets, and the reversion, with payment thereof. By the same deed, Andrew released all manner of execution, personal or real, competent to him for the above sum, except by apprising the lands, which he reserved a power to do, ' provided nevertheless, that if the

1734.
 ROXBURGH
 v.
 KERR, &c.

‘ said wadsets or bond should be quarrelled by the
 ‘ said earl or his heirs, or by the heirs of line, male,
 ‘ or tailzie, of Robert Earl Roxburgh, and Henry
 ‘ Lord Kerr, his son, that then the said release
 ‘ should be null and void, and that the said An-
 ‘ drew and William Kerr should be at liberty to
 ‘ sue all manner of execution, real or personal, to
 ‘ recover payment of the whole sums contained in
 ‘ the said bond and deeds of wadset.’

Andrew Kerr paid off all those debts, and died ;
 and in 1666, no part of the £7,500 merks having
 been paid, the curators of his son William obtained
 upon the above bond a decree of apprising of the
 lands contained in the wadsets. Upon this title the
 lands were afterwards possessed by William Kerr.
 He sold part of them to Elliot (father of the re-
 spondent ;) and the remainder, upon his death,
 vested in his daughter, Christian, (respondent.)

In 1729, an action was brought by the Duke of
 Roxburgh, then in possession of the estate under
 the entail, to set aside the above deeds, on the
 ground that the transaction was an indirect con-
 trivance to alienate the lands in defraud of the en-
 tail, and that notwithstanding it, an equity of re-
 demption was still competent to him upon payment
 of the debts.

It was likewise alleged that several of the debts
 in consideration of which the deeds were granted,
 had been previously paid ; but it is unnecessary to
 detail the discussion which arose upon this last point.

July 23, 1731. The case was reported by Lord Coupar, Ordi-
 nary, when the Court found, “ that the two con-
 “ tracts of wadset, and bond of eik were lawful

“ transactions and not inconsistent with the tailzie,
 “ and repelled the objection made by the pursuer
 “ against the 15,000 merks bond due to Murray
 “ of Longharmiston, and assigned by him to Scott
 “ of Langshaw, and also repelled the objection
 “ against the 5000 merks bond of Earl William
 “ and Kerr of Chatto to Sir William Scott of
 “ Clerkington, and found the same was applied
 “ for purchasing of two debts of Harry, Lord Kerr,
 “ of the same extent, with which the tailzied estate
 “ was burdened ; and found the bond of corrobor-
 “ ration and eik granted by Earl William of debts
 “ due by Robert, Earl of Roxburgh, maker of the
 “ entail, was a sufficient ground of an apprising,
 “ whereof the legal might run.”

1733.

ROXBURGH

“
 KERR, &c.

The appeal was brought from this interlocutor. Entered

Pleaded for the Appellant :—Earl William was,

Jan. 26, 1733.

by the entail under which he possessed, prohibited to make any alienation, disposition, or other conveyance of any part of the estate, even in satisfaction of the debts due by the maker of the entail. He had only a power to charge it with such of those debts as should not be paid from the personal estate of the entailer in manner directed by him. But the wadsets and bond above mentioned, being the foundation of the decree of apprising, are a mere contrivance to render the redemption impossible, and an indirect alienation to the prejudice of the heirs of entail, equal in effect to an absolute conveyance ; and they ought therefore to be set aside, to the effect at least that the appellant may still have the power of redeeming by payment of what may be due.

1735.
 ROXBURGH
 v.
 KERR, &c.

Although it may be true that the lands might have been carried off by an apprising obtained for the debts of Earl Robert; yet as Earl William could not himself alienate the lands, or do any deed whereby they might be evicted, no apprising upon his deed could expire or have any effect except according to the limitations of the entail. The apprising in this case was not obtained for the debts of Earl Robert, but upon the bond, which was Earl William's deed alone; and although he might grant a bond of corroboration to the effect of making himself personally liable; yet an apprising upon his bond of corroboration or for his debts, if it is not likewise for the debts corroborated, cannot expire. Were it otherwise, an heir of entail, wishing to get the better of the entail, might do so in any case by merely suffering a decree of apprising upon his own deed to expire.

*Pleaded for the Respondents:—*Earl William had, by the express terms of the entail, a power to *burden* the estate with the debts of the entailer, and as he was not restricted to any particular form, he was at liberty to affect it with any sort of burden which the law allowed, and which the creditors would accept of. Proper wadsets were the most usual securities granted at that time; and however beneficial they might be to the creditor, the Earl, or those claiming under him, had the power of redeeming when they were inclined to do so. The heirs of entail had power by the entail to feu, and therefore much more were they enabled, by the power reserved to them of burdening the estate

with the entailer's debts, to grant redeemable securities, such as proper wadsets.

With regard to the bond, although the entail prohibits any deed whereby the estate may be adjudged or evicted, yet there is expressly given, by way of exception from this disabling clause, the power of burdening with the entailer's debts. Securities given in virtue of this power, must necessarily contain an obligation to pay ; and that obligation, by the force of the law, must necessarily produce process of apprising, adjudication, and other methods for making it effectual. Earl William, therefore, did nothing with respect to charging the estate with the entailer's debt which he might not lawfully do ; and it is evident that what he did was most prudent and beneficial to his successors. It must be admitted that decrees of apprising might have gone on every one of the debts severally, which composed the gross sums contained in the wadsets or bond of eik ; that each of these apprisings might have affected the whole estate ; and that, in point of fact, both Earl William and Andrew Kerr were actually sued for some of the entailer's debts. Under these circumstances, the Earl drew as many of the debts as he could into the hands of one creditor, to whom he granted the wadset, and thus confined his diligence to the limited portion of the estate over which the wadset extended.

After hearing counsel, " it is ordered and adjudged, &c. that the appeal be dismissed, and the said interlocutor therein complained of, be affirmed."

1735.
ROXBURGH
v.
KERR, &c.

Judgment
March 18,
1735.

1785.

MONCRIEFF
v.
MONCRIEFF.

For Appellant, *Ro. Dundas* and *W. Murray*.
For Respondents, *Dun. Forbes* and *Will. Hamilton*.

SIR THOMAS MONCRIEFF, Bart. *Appellant* ;
THOMAS MONCRIEFF, Esq. *Respondent*.

21st March, 1785.

ALIMENT.—The Court of Session having modified aliment to a son, the same was restricted to the allowance which had originally been voluntarily given by the father.
Judgment for the appellant *ex parte*.

No. 33. THE respondent having by his marriage and conduct in other respects offended his father, (the appellant,) a quarrel unhappily arose, notwithstanding which, the latter made him an allowance of 2000 merks Scots, equal to L.111, 2s. 2½d. sterling.

The respondent raised an action before the Court of Session for a larger aliment, on the ground that *jure naturæ*, his father was obliged to provide for him according to the extent and circumstances of his estate. The Lord Ordinary “ordained either party to give in a condescendence of the defender’s estate.”

Jan. 17, 1784.

A condescendence was given in by the son, and the case being reported to the Court, they “ordained the defender to give in a condescendence

“ betwixt and Thursday next, with certification
 “ that, failing thereof, they will proceed upon the
 “ condescendence given in by the son.”

1735.

MONCRIEFF
 v.
 MONCRIEFF.

The defender petitioned against this interlocutor, on the ground that the sole foundation of the cause was for an aliment *ex jure naturæ*, and having voluntarily given his son 2000 merks per annum, it ought to be found that this was a sufficient aliment, and that he was not bound to expose his circumstances by giving in a condescendence of his estate. The petition was refused, and afterwards the following interlocutor was pronounced :

January 31.

“ On report of the Lord Justice Clerk, the Lords
 “ having considered the condescendence given in
 “ by Mr. Moncrieff, Sir Thomas declining to make
 “ any, modify L.200 sterling of yearly aliment, be-
 “ ginning the petitioner’s payment at Whitsunday
 “ last, being the first term after citation for the pre-
 “ ceding half year, and so to continue yearly there-
 “ after, payable at two terms, Whitsunday and
 “ Martinmas, by equal portions.”

Along with a petition against this interlocutor, the defender gave in a condescendence, stating his real estate at between L.500 and L.600 a-year, and his personal at about L.5000, whereupon the cause was remitted to the Lord Ordinary to hear parties, and upon his report the petition was re-
 fused.

February 19.

The appeal was brought from the interlocutors of the 17th, 25th, 29th, and 31st days of January last, and the 6th and 19th days of this instant February.

Entered
 Feb. 19, 1735.

*Pleaded for the Appellant:—*Without arguing

1785.

MONCRIEFF

v.

MONCRIEFF.

whether or not parents are by the law of nature obliged to maintain their children after they come of age, and are able to shift for themselves, or whether the children may not forfeit their claim by disobedience,—there are, in the circumstances of this case, no grounds for the present claim, the appellant having voluntarily allowed and punctually paid to his son what was sufficient to supply him, not only with the necessaries, but (in a cheap country) with all the conveniences of life.

There is no doubt that parents are bound to maintain their children while they are unable to provide for themselves ; but that a son should, beyond a necessary maintenance, be entitled to a determinate part of his father's estate, is a claim which is unprecedented in any country, and contrary both to the law of Scotland and to reason, and fraught with the worst consequences.

As it is certain that any man may disinherit his son, and deprive him of his estate after his death, it follows that during his life also, he has the same absolute power over it, and may dispose of it as he pleases. And as the father only knows what fortune he intends to give his son hereafter, he only can judge what maintenance is suitable to his condition, so that he may not be unfitted by present abundance for his future situation in life.

There is little danger of the parental power being used with too much rigour; the excess is seldom on the severe side. But if a child, whether dutiful or undutiful, may demand a certain quantity of his father's estate, the father will be deprived of all power of rewarding virtue or dis-

couraging vice in his children. He will have no control over them with regard to their education, place of abode, or course of life ; and his authority may safely be slighted when the son is sure of getting whatever his father's circumstances can afford, whether he will or not.

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MONCRIEFF
v.
MONCRIEFF.

It would invert the order of nature, and subject parents to their children, were it in the power of the latter, from caprice or undutifulness, to compel their father (as has been done in the present case,) to expose his private circumstances to the world ; by which it may happen that he sustains irreparable injury.

The present action is brought upon the law of nature only, and not upon any positive statute ; but nature knows no distinction between the oldest and the youngest child ; they are equally entitled to the parent's care and affection. The appellant has four other children who have the same right to maintenance that the respondent has ; and therefore the exorbitance of the proportion allowed by the Court of Session must be apparent, as it amounts to nearly a fourth part of his whole income.

If the present claim is well founded, it must follow that a son, living in his father's house, may complain that his father does not live so well, or keep so good a table as his fortune might afford, and therefore pray to have a maintenance suitable to his circumstances. The economy of every man's private family is left to his own direction ; and in questions of this sort, the income of the father ought no otherwise to be considered than with the view of excusing him altogether from the main-

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MONCRIEFF

v.

MONCRIEFF.March 21,
1735.

tenance of his children, on the ground of his having no more than is absolutely necessary to support himself.

“ Counsel appeared for the appellant, but none for the respondent ; and the appellant’s counsel being fully heard, the several interlocutors of the Lords of Session complained of were read ; as likewise a petition of the appellant to the said Lords of Session, praying, ‘ that the aliment allowed to the respondent may be restricted to 2000 merks Scots per annum ;’ and due consideration had of what was offered in this cause at the bar ;

Judgment.

“ It is ordered and adjudged, &c. that the said interlocutors be so far varied, as that the allowance for the maintenance of the respondent be modified to 2000 merks Scots per annum.”

For Appellant, *Dun. Forbes* and *W. Murray*.

1735.

CRAWFORD
v.
LORD GARNOCK.

The HONOURABLE JOHN CRAWFORD, }
commonly called Master of Gar- }
nock, an Infant, by JOHN CRAW- } *Appellants;*
FORD, his Uncle, and the said JOHN }
CRAWFORD for himself, - - - }
PATRICK VISCOUNT of Garnock, }
and his Creditors; and JAMES, } *Respondents.*
MARGARET, and ANNE CRAW- }
FORD, his Brother and Sisters, }

28th April 1735.

TAILZIE.—**TITLE TO PURSUE.**—An heir under an entail, which was not properly recorded, having possessed without inserting in his infeftments the fetters of the entail, and contracted debts; the next heir (who had made up his titles in the same manner,) brought an action to have it declared that these debts were chargeable on the estate, and that he might lawfully sell a part of it in order to pay them. It was found that he had no power to sell,—the right of the creditors to bring proper actions for affecting the estates being reserved.

SIR JOHN CRAWFORD of Kilbirnie executed, in 1662, a strict entail, whereby he settled his estates of Kilbirnie and Drumry upon Margaret his youngest daughter, and the heirs male of her body; whom failing, certain other substitutes. It was particularly provided, under strict irritant and resolute clauses, “that it should no ways be lawful to the said Margaret Crawford, or the heirs of her body, nor to any other of the heirs of entail, at

No. 34.

1735.

CRAWFORD

v.

LORD GARNOCK.

“ any time thereafter, to sell, dispose, or wadset, or
 “ put away any part of the said lands and barony,
 “ or other lands particularly therein mentioned, or
 “ any part thereof, or any annual rent or yearly
 “ duty, to be applied out of the same, or to con-
 “ tract debt, or do any other fact or deed, where-
 “ by the same or any part thereof might be ap-
 “ prised or evicted from them,” &c. ; and these re-
 strictions were appointed to be engrossed in the
 infeftments to follow thereon.

Upon this deed Margaret was infeft, and her in-
 feftment duly confirmed. But the entail was not
 recorded in the Register of tailzies.

Upon her death she was succeeded by her son
 John, created Viscount of Garnock, who possessed
 in fee simple his paternal estate of Glengarnock.
 He was served and retoured next heir of provision
 to his mother in the lands of Kilbirnie ; and in the
 lands of Drumry, he was infeft upon a precept of
clare constat from the Dutchess of Lennox, superior.
 Neither these infeftments, however, nor their war-
 rants contained the prohibitory, irritant, and reso-
 lutive clauses, directed by the entail to be inserted
 in them, but only this general reference to them as
 engrossed in the charters of confirmation in favour
 of his mother ; “ *secundum formam et tenorem pri-*
 “ *orum infeofamentorum dict’ terrarum sub pro-*
 “ *visionibus et conditionibus in iisdem content.*”

Viscount John died in 1708, after having contract-
 ed considerable debts. He was succeeded by his
 son, Viscount Patrick, who duly made up titles as
 heir to his father, both in the fee simple property
 of Glengarnock, and in the entailed estates ; but

the conditions of the entail were not repeated in his infeftment. Being advised that, in consequence of the omission to insert in his father's titles the fetters of the entail, as well as because the entail was not recorded, the estates were subject to his debts, he granted bonds of corroboration to the creditors, by some of whom adjudications were afterwards raised against the estate, and decrees obtained in 1722.

1735.
CRAWFORD
v.
LORD GARNOCK.

Viscount Patrick then brought an action of sale of part of the entailed estate before the Court of Session; the debts greatly exceeding in amount the value of the fee-simple lands. To this action his eldest son, the master of Garnock, and the creditors were made parties.

The Court found, (25th June, 1725,) "that the foresaid tailzie of the said estate of Garnock* was not effectual against the creditors, and therefore that the pursuer, the Viscount of Garnock, had power to sell for payment of the creditors."

Upon advising a petition against this interlocutor for the master of Garnock, in which it was pleaded, 1st, That the entail was not subject to the regulations of the act 1685, having been executed prior to its date; and 2^{dly}, That the reference to the entail in the infeftments was sufficient and as effectual against creditors as if the clauses had been engrossed *verbatim*, the Court adhered, and found, (28th July, 1725,) "that the act of parliament 1685, regulates the transmission of tailzies made before the said act, as well as those made since;

* The lands contained in Sir John Crawford's entail.

1735.
CRAWFORD
v.
LORD GARNOCK.
“ and that the general reference in the sasine is not
“ sufficient to interpel creditors according to the
“ act 1685.”

A proof was then allowed of the rent and value of the lands, and of the extent of the debts, which, being reported by the Lord Ordinary, an articulate interlocutor was (28th February, 1784) pronounced in terms thereof.

Entered
Feb. 7, 1735.

The appeal was brought from these interlocutors of the 25th June and 28th July, 1725, and the 28th February, 1724.

(It is unnecessary to state the arguments in this case, as the judgment of the House of Lords proceeded upon a ground which was not pleaded by either party in the printed papers.)

Judgment
April 28,
1735.

After hearing counsel, “ it is declared by the
“ Lords Spiritual and Temporal in parliament as-
“ sembled, that the said *Patrick* Lord Viscount of
“ Garnock not having inserted in his enfeoffment
“ the prohibitory, irritant, and resolute clauses,
“ contained in the original settlement made in the
“ year 1662, called a Bond of Tailzie, the said in-
“ terlocutory sentences of the Lords of Session,
“ complained of in the said appeal, be, and the
“ same are hereby reversed ; but without prejudice
“ to the question of law, in case proper suits be
“ brought by the said creditors in order to recover
“ their respective debts.”

For Appellants, *Ch. Areskine* and *Will. Hamilton*.

For Respondents, *Dun. Forbes* and *W. Murray*.

1735.

HERIOT
v.
RAY.

GEORGE HERIOT, *et alii*, styling themselves Magistrates and Members of the Town Council of Haddington, } *Appellants* ;
WILLIAM RAY, *et alii*, likewise styling themselves Magistrates and Members of the Town Council of Haddington, } *Respondents*.

30th April, 1735.

BURGH ROYAL.—PRESCRIPTION.—Act 7. Geo. II. c. 16.—An action being brought for setting aside the election of Magistrates on the ground of irregularities in the previous election of deacons of trades,—it was found that the limitation of eight weeks imposed by the statute, was to be reckoned from the date of the election of Magistrates, and not from that of the deacons.

It was found that, in the event of an equality at the election of a deacon of the trade, the old deacon had a casting vote.

It being argued that a person was disqualified for voting at the election of a deacon, because he was bellman of the borough—the objection was repelled.*

At the election of magistrates for the borough of Haddington, a dispute having arisen between two parties, each of whom pretended that they were duly elected, mutual actions of reduction and declarator were raised for setting aside their opponents, and declaring their own right. No. 35.

* The import of the judgment upon the last point is uncertain, it being stated by the respondents that, in point of fact, the voter had resigned his office before he tendered his vote.

1735.

HERIOT

v.

RAY.

It appears that at the previous meeting of the incorporation of hammermen for the election of their deacon, Robert Sawers and John Hay had offered themselves as candidates. The votes, being eight in number, were equally divided; whereupon the former deacon, who presided on the occasion, gave his casting vote for Sawers.

It was objected on the part of the appellants, that, even in the case of there being an equality, the old deacon had no privilege of a casting vote; but it was further objected, that John Young, one of the voters, was, by the rules of the borough, disqualified as a public servant, being bellman of the town. It was likewise stated, that Robert Sawers had not paid up his quarterly accounts to the incorporation, and was, on that account, incapable, in terms of an act of council, of electing or being elected.

At the election of the deacon of the weavers, the corporation separated. One party chose Charles Lawrie, in the interest of the respondents; while the adherents of the appellants held a separate meeting, and elected Andrew Smith.

Under these circumstances, these several individuals assumed to themselves the *status* of deacons, and voted at the subsequent election of magistrates. John Hay and Henry Smith supported the appellants; Robert Sawers and Charles Lawrie supported the respondents; and the question between the parties turned upon the merits of the previous elections of deacons.

The appellants, who had got possession, objected to the competency of the respondents' action, on

the ground that it had not been raised within eight weeks from the date of the election, which was alleged to have been irregular; that being the time limited by the act (7 Geo. II. c. 16. § 7.) for bringing such actions.

The respondents answered, that the prescription in the act founded on relates only to the general annual election of magistrates and councillors, and not to the election of deacons; and, at any rate, that they (the respondents) having continued in the peaceable possession of their office until the occasion of the general election, when the appellants declared their election void; the wrong of which they complain was only done then, and, consequently, the prescription against their right of complaining can only run from that time.

They further answered, that the bellman did not receive any wages from the town, and that, although a public servant, he was not thereby disqualified; either by the rules or the practice of the burgh.

In reply to this, the appellants adduced an act of the council, made in February 1734, by which they discharged any of the town servants to vote at subsequent elections.

To this it was answered, that the council had no power to make such a by-law, and that the same had been unanimously rejected by the incorporation. It was further stated that, in point of fact, Young had resigned his office, and another person had been elected bellman in his stead, before he gave his vote; so that the objections, even if they were sound, would not apply to him.

As to the objection made to the casting vote,

1735.

HERIOT

V.

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HERIOT

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RAY.

the respondents answered, that, by the custom of Haddington, as well as of almost all the boroughs in Scotland, deacons have two votes,—one in course with the other members of the trade, and the other as a casting-vote, in the event of there being an equality; in the same manner as it was found, in a late case, that the provost of this borough had; and as it has been found, in the cases of the hammermen of Perth, and the goldsmiths of Edinburgh, that deacons had.*

The Court (26th February 1735) “repelled the objection, that it was more than eight weeks after the election of the deacons, before the raising the said William Ray’s process; and sustained the said John Young’s vote, notwithstanding the objection; and found that the deacon of a trade has a title to the first vote, and also to the casting vote, in case of an equality; and repelled the objection, that Robert Sawers was under an incapacity, because of his deficiency in his quarterly payments, of being elected a deacon, and found him duly elected; and before answer, allowed either party a conjunct proof, as to the points not above determined; and ordained either party to give in a condescendence of the facts they want to prove.”

A petition was presented by the appellants, in which they stated, that the summons with which they had been served was blank, and pleaded, 1st, that the prescription must apply, because execut-

* None of the decisions here referred to have been found in the reports.

ing such a summons was not raising an action in terms of the statute ; and, 2d, That Robert Sawers was not duly qualified to be elected, in regard he did not pay scot and lot, and because of the other objections already stated against him.

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HERIOT

v.

RAY.

The Court (28th February 1735) " refused the " said petition as to the prescription, in regard no " blank summons can now be executed ; but or- " dained the other points of the said petition to be " seen and answered against the 1st of June, with- " out prejudice to the act already pronounced to " go out," &c.

The appeal was brought from these two interlocutors of the 26th and 28th February 1735.

Entered
Mar. 11, 1735.

After hearing counsel, " it is ordered and ad- " judged, &c. that the appeal be dismissed, and the " interlocutory sentences therein complained of be " affirmed."

Judgment
April 30, 1735.

For Appellants, *Ja. Erskine* and *Will. Ham-
ilton.*

For Respondents, *Ch. Areskine* and *W. Murray.*

It does not appear that the question regarding Sawers' incapacity, (upon which point the reclaiming petition had been appointed to be answered,) was made the subject of the appeal. In the respondents' paper it is expressly assumed that it was not, and, accordingly, no argument is there given upon the subject.

1736.

GORDON
v.
URQUHART.

SIR WILLIAM GORDON, Bart. ALEX- }
ANDER GORDON of Ardoch, Esq. } *Appellants* ;
and others, Tenants of Ardoch, }
JANE MACKENZIE, Widow of JOHN }
URQUHART of Newhall, Esq. - } *Respondent*.

6th February, 1736.

PERSONAL AND REAL.—DISCHARGE.—A widow being infeft for her jointure in certain lands, agreed with the son to accept a restricted sum out of other lands, which being afterwards sequestrated by his creditors, she brought an action against the purchaser and tenants of the first estate for her jointure and bygones ;—the claim was sustained.

The purchaser having acquired right to a wadset of the lands, in consideration of which he had reserved a part of the price,—found that the wadset, though prior in date, did not stand in the way of the claim.

Costs, L.40, given to respondent.

No. 36. ALEXANDER URQUHART possessed the lands of Ardoch, subject to a wadset for 8000 merks Scots. In the marriage contract of his son John with the respondent, these lands were conveyed to her in liferent for her jointure, to the amount of nine chalders of victual, with customs and services, with other lands in case of eviction or non-redemption. In 1696, John sold the lands of Ardoch to Sir Adam Gordon, (father of the appellant,) who in consideration of the incumbrances with which they were charged, was allowed to retain a proportion of the price in his hands.

The respondent afterwards entered into an ar-

rangement with her son, whereby she agreed to restrict the jointure to six chalders and a mansion-house, and to accept the victual out of the lands of Newhall, in lieu of that payable to her from the lands of Ardoch ; but she did not renounce her infestment in Ardoch. In virtue of this agreement, she possessed the lands of Newhall, house and gardens, as her jointure, till about 1727, when her son's affairs having become embarrassed, the estate was sequestrated by the Court. He shortly afterwards died insolvent.

The respondent brought an action against the appellant, Alexander Gordon, who then possessed the estate, and against the tenants, for recovering the rents and profits of the lands ; and also for reducing the conveyance by her husband, and all that had followed thereon, in so far as they stood in the way of her infestment.

It was stated in defence, that as the respondent had, by the contract 1715, not only restricted her jointure to six chalders, but had accepted of a new allocation of the same, in full satisfaction of her jointure upon Ardoch, she could not afterwards have recourse upon Ardoch. To this it was answered, that that contract was only a personal engagement with her son, to be contented with a smaller payment out of the lands of Newhall than she was entitled to out of those of Ardoch. As she had not renounced her real right on Ardoch, so neither had she received any real security on Newhall ; and even if the transaction had amounted to an excambion, the nature of that contract is such, that, upon eviction of the lands, the party suffering it is entitled to resume what he gave in exchange. The case being reported to the Court, it was found,

1732.

GORDON
v.
URQUHART.

1736. (22d July 1730,) "that the pursuer had recourse
 GORDON "to her jointure lands of Ardoch;" and the Lord
 v. Ordinary (25th July,) "decerned in the mails and
 URQUHART. "duties against the tenants and possessors."

Various proceedings followed; and on the 24th June 1732, the Court found, "that the pursuer had recourse to her jointure lands of Ardoch, to the extent of six chalders of beer yearly, with the customs, services, and carriages suitable thereto; but found she had no recourse to the house or gardens of Ardoch." Upon advising a petition against the latter part of this interlocutor, they found, (18th February 1733,) "that the pursuer was not only entitled to six chalders of victual, but also to a house; and decerned accordingly," &c.

In the mean time, the appellant, Alexander Gordon, presented a petition, founding upon the wadset on the lands, which, he contended, being prior in time to the jointure, must be preferable to it; to which it being answered, that a part of the price had been retained by the purchaser, for paying off incumbrances, of which the wadset was one, and the estate was thereby cleared of it—the Lord Ordinary, to whom the cause was remitted, found, (19th January 1733,) "that the wadset right being paid by the price of the lands, could not compete with the relict, and therefore preferred the lady, and decerned."

Entered
 Feb. 7, 1735.
 Amended
 May 3.

The appeal was brought from part of the interlocutor of 24th June 1732, and from those of the 28th February and 30th April 1733.*

* The journals do not instruct what other interlocutors were added when the appeal was allowed to be amended.

*Pleaded for the Appellants:—*1. The wadset for 8000 merks was a *bona fide* incumbrance upon the estate, before the respondent's marriage contract; and as the same was purchased by Sir Adam Gordon, he ought to stand in the place of the incumbrancer, against whom she could not have recovered one penny of the rents till redemption; and although this incumbrance was deducted out of the price of the lands, that is no reason why Sir Adam Gordon should not have the benefit of it, to protect his possession when purchased in with his own money.

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GORDON
v.
URQUHART.

2. The contract in 1715, whereby the respondent released her liferent in Ardoch, and accepted of a new allocation for six chalders over Newhall, was a contract for love and favour from a mother to her son, and was intended to relieve him of his warrandice to the purchaser, and therefore ought not to be construed as a mere excambion; and it would be extremely hard to permit her now to depart from it, and have her relief against the purchaser, who, resting on the faith of it, has lost the benefit of her son's warrandice, he having since died insolvent.

3. Supposing the sequestration of the lands of Newhall from the respondent to be a foundation for relief against those of Ardoch, yet such relief ought not to exceed what she restricted herself to by the foresaid agreement; and therefore there was no ground for decreeing to her the customs, carriages, and services, or an allowance for a house.

4. The heirs of the respondent's brother ought to have been made parties to the action, because payments may have been made, or other satisfaction given to the respondent for her jointure, which cannot be instructed but by them; and because the

1726.
GORDON
v.
URQUHART.

purchaser would be entitled, in the event of the present claim being sustained, to recover damages from them under the claim of warrandice.

Pleaded for the Respondent:—1. The wadset, in terms of the minute of sale, was paid off with part of the price covenanted to be given for the lands, which was the money of the seller, and a release and renunciation of the wadset was taken, as well to the seller as to the purchaser, according to the provision in the minute; which shows that an extinction, and not a conveyance, was intended, as well as executed. Therefore, neither Sir Adam, nor any deriving right from him, can found upon this wadset, to exclude the respondent's jointure.

2. The respondent never renounced her infeftment in the lands of Ardoch, nor received any other in lieu thereof. The agreement amounts to no more than a restriction of her demand to six chalders, and a personal obligation on her to be contented with a jointure to that extent, out of the lands of Newhall, and a personal obligation on her son to secure her in that payment; and if an actual excambion had been made, she would have been entitled by law, upon the eviction of Newhall, to return to her jointure lands.

Judgment,
Feb. 6, 1736.

After hearing counsel, "it is ordered and adjudged that the appeal be dismissed, and that the several interlocutors, or parts thereof, as are therein complained of, be, and are hereby affirmed; and it is further ordered, that the said appellants do pay, or cause to be paid, to the said respondent, the sum of forty pounds, for her costs, in respect of the said appeal."

For Appellants, *R. Dundas, A. Hume Campbell.*
For Respondent, *Dun. Forbes, W. Murray.*

1736.

BREADAL-
BANE
v.
INNES, &c.

JOHN, Earl of BREADALBANE, - - *Appellant*;
WILLIAM INNES, GEORGE, Lord }
REAY, *et alii*, - - - - - } *Respondents*.

11th February 1736.

FOREIGN.—A Scotchman dying in England, where his will was duly proved by the executor therein nominated,—it was found that an executor-creditor could not recover in Scotland a debt due upon a bond to the deceased.

OATH OF PARTY.—PRIVILEGE.—A claim of debt against a Peer being referred to his oath, the Court of Session found that he was not entitled to have his examination taken upon honour. This point was not expressly decided in the House of Lords.

MAJOR SINCLAIR, by his last will and testament, ap- No. 37. pointed Anne Tibo his sole executrix, by whom, upon his death, which happened at London in 1718, the will was duly proved in the prerogative Court of Canterbury.

William Innes, being a creditor of Major Sinclair to a considerable amount, was confirmed executor-creditor in Scotland, and thereafter raised an action against the Earl of Breadalbane, for payment of a sum of L.100, with interest, contained in a bond granted by the Earl in favour of Major Sinclair. Innes's right afterwards came, by successive assignations, to be vested in Lord Reay, the respondent.

The bond not being forthcoming, the debt was referred to the Earl's oath, (he having denied that it was due by him to the extent claimed,) and com-

1736.
 BREADAL-
 BANE
 v.
 INNES, &c.

mission was granted for taking his deposition in London; but the Earl having failed to depone, the Lord Ordinary decerned against him in terms of the libel.

After some other proceedings, it was pleaded in defence for the Earl, that, by the Major's will, which had been proved in the proper Court in England, Anne Tibo was named his executrix, and therefore he could not be compelled to pay the contents of the bond to the pursuers, until she was made a party to the suit; for as the bond itself was not produced or ready to be delivered up and cancelled upon payment, he might be sued anew by her in England, and compelled to pay the debt over again.

It was answered that it was unnecessary, and indeed impossible, to make any other person than the Earl a party to the suit, because as the executrix did not reside in Scotland, she was not amenable to the Courts there. At the same time, the pursuers were willing, for his further security, to grant a discharge with absolute warrandice.

The Lord Ordinary (December 18, 1734,) "re-
 "pelled the allegiance made for the Earl of Bread-
 "albane, the defender, in respect of the answer
 "made thereto for the pursuer; and decerned the
 "pursuer, upon payment, to grant a discharge to
 "the Earl, with absolute warrandice."

Upon advising a petition for the Earl, the commission for taking his oath was renewed. And another petition being presented, praying an enlargement of the time for his examination, and that the examination might be taken upon honour, according to the custom of examining peers in similar cases in England; and likewise that he might

be allowed an opportunity of making the executrix a party,—the court (Feb. 27, 1735,) refused the desire thereof, and adhered.

The appeal was brought from the interlocutors of the 20th June, 12th November, and 18th December 1734; 22d January, and 27th February 1735.

Pleaded for the Appellant:—1. Major Sinclair, from whom the money was borrowed, having by his will appointed an executrix, who has duly proved that will, she only, as his proper representative, is entitled to sue the appellant; and as she must be possessed of the document of debt, she alone can give a proper discharge upon payment of it.

The respondents, who are only creditors of the Major, have no right to sue his debtors. The executrix is the proper person against whom such a suit ought to be directed; and, at any rate, an action cannot be properly carried on against the debtors of the deceased until the executrix is called as a party to it.

For if she who is possessed of the bond, be not made a party, then the appellant may be sued a second time by her; and it would be in vain to plead in bar to such an action, raised by her in England, that the appellant had been decreed by the Court of Session to pay the debt to another person. The executrix not being a party to the present action, her interest cannot be affected by it; and the appellant has always been ready to pay whatever sum may be actually owing by him, upon receiving a proper discharge, and being effectually relieved of all claims against him at the instance of her, or any having right through her to the bond in question.

1736.

BREDALE-
SANE

v.

INNES, &c.
Entered
March 14,
1736.

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 BREADAL-
 BANE
 v.
 INNES, &c.

This debt cannot be considered as part of the effects of the testator in Scotland, it having been contracted in England, and no real security given, of a nature to subject it to the Scottish Courts. The appellant, residing in England as frequently as in Scotland, is thereby exposed to action at the instance of the executrix.

2. If the appellant was to be examined, his examination ought to have been taken upon honour ; he being, as a peer of Great Britain, entitled to that privilege of the peerage.

*Pleaded for the Respondents :—*1. As the appellant cannot pretend that he had paid the debt to the executrix in England, he cannot avoid paying it to the executor in Scotland, who has made up a proper title according to law. For as the administration in England could not vest in the executor there any right to such of the Major's property as was in Scotland, it could not stand in the way of his creditors recovering that property by the legal form. It would produce infinite inconvenience were it the rule that creditors in one part of the kingdom must, in such a case, sue the executors appointed in the other part, and be barred from recovering the effects of their debtor from persons who are within the jurisdiction in which his effects are situated. Although the bond happened to be granted in England, yet as Major Sinclair was a Scotsman, and likewise the appellant, who has his estate and ordinary residence in Scotland, the sum contained in the bond must be held to be part of the Major's effects in Scotland ; and as there is no doubt that his creditors in Scotland could, during his lifetime, by arrestment and forthcoming, have compelled the appellant to pay to them without the

Major's consent, and in competition with him, it is evident that they must have the same remedy after his death, in preference to his English executor, who has not hitherto made up any proper title to such of his effects as are situated in Scotland.

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BRADAL-
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2. Although in the High Court of Chancery, answers put in by the peers upon their honour, are held sufficient, yet the respondents are advised that when it is necessary for peers to give evidence in any cause, they submit to be examined upon oath. In the present case the appellant's oath is demanded *in modum probationis*, and it will be by the law of Scotland conclusive evidence for himself as well as for the respondents.

After hearing counsel, "it is ordered and ad- Judgment,
"judged, &c. that the several interlocutors com- February 11,
"plained of be, and the same are hereby reversed; 1736.
"and that the appellant be absolved from the pre-
"sent instance or libel."

For Appellant, *William Hamilton*.

For Respondents, *Dun. Forbes* and *W. Murray*.

1736.

TROTTER
v.
MARCHMONT,
&c.

HENRY TROTTER, of Morton Hall, } *Appellant;*
Esq.

ALEXANDER, EARL OF MARCHMONT;
WILLIAM, EARL OF HOME; AN-
DREW HOGG of Harcarse, Esq.; } *Respondents.*
WILLIAM HOME and ROGER
MOODIE;

12th February, 1736.

COMMONITY.—PRESCRIPTION.—The proprietor of a moor (over which several heritors had rights of servitude,) possessed other lands, to which no servitude on the moor belonged, but the tenants of which were in use for above forty years, of pasturing cattle, &c. in common with the occupiers of the dominant lands. Found in a process of division of the moor, that the proprietor of the moor, (besides one fourth *tanquam præcipuum*,) was entitled to a share in respect of these other lands.

TITLE TO PURSUE.—Act 1695, c. 38.—Found that a person, having only a right of servitude, is entitled to pursue a division under the Act 1695.

[Fol. Dict. I. p. 155. III. p. 137. Edgar p. 16—Rem. Dec. I. No. 42, p. 83. Mor. Dict. p. 2462.]*

No. 38. THE Barony of Fogo, with the common moor of the same, belonged originally to the Earls of Home. The lands were afterwards parcelled out among different heritors; the greater part, with a servitude of pasturage and feal and divot on the moor, belonging to the respondents, and the remainder being possessed by the appellant and his predecessors, in virtue of a wadset from the Earl of Home. The appellant was also infeft in the lands of Char-

* The part of the case which is given in these reports, (relating to the claim of *præcipuum*,) was not made the subject of the appeal.

terhall and Whinkerstones, which were contiguous to the common, but did not form part of the Barony of Fogo.

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TROTTER

v.

MARCHMONT,
&c.

An action was raised by Hogg of Harcarae, one of the heritors, for dividing the common in terms of the act 1695, c. 38.

The appellant claimed a share of the moor, *tanquam precipuum*, to himself as proprietor, being in right of the Earl of Home. He further claimed a portion in respect of his lands of Charterhall and Whinkerstones, the tenants of which had been in uninterrupted possession of a right of commonity thereon for above forty years. The Earl of Home objected that although the tenants of these lands might have had such possession, yet that was to be presumed to have been only by licence of the appellant's ancestor, who although infeft in those lands, had at the same time the wadset from Lord Home's ancestor of the moor itself; such licence by the wadsetter could not acquire to those lands any right of commonity upon the moor, to the prejudice of the other dominant tenements.

A question having also arisen touching the title of a person having only a right of servitude to pursue for such a division, the court (31st December 1723) found "that a person, though having only "a right of servitude, was entitled to pursue a division on the Act of Parliament 1695; And that "the defender (Mortonhall) could not prescribe a "right of servitude on the Moor of Fogo, for his "lands of Charter-hall, Whinkerstones, &c. by any "possession the tenants of the said lands might "have on the said moor after the date of the wadset right of the lands of Fogo and the said moor "by the Earl of Home to his predecessors."

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 TROTTER.
 v.
 MARCHMONT,
 &c.

Thereafter (7th January, 1724,) it was found
 "that the proprietor ought to have a fourth part
 "of the moor allocated to him, *tanquam præcipuum*,
 "as the value of his property, and that the re-
 "mainder ought to be divided proportionally,
 "conform to the act of Parliament, amongst the
 "neighbouring heritors who had possessed the
 "same as common; allowing the proprietor
 "always a share in that division effeiring to his
 "lands, whereof the tenants had promiscuous pos-
 "session with the heritors of the dominant tene-
 "ments," &c.*

A petition was presented by Mortonhall against
 the previous interlocutor of the 31st December,
 upon advising which, the court (23d Jan.) found
 "that he could not prescribe a right of servitude
 "on the Moor of Fogo for any lands belonging to
 "him in property, not contained in the wadset
 "right, by any possession the tenants of the said
 "lands might have had on the moor after the date
 "of the wadset right; without prejudice of any
 "right, or claim of servitude, or possession, com-
 "petent to him or his predecessors for their other
 "lands prior to the wadset; and that the said pos-
 "session, during the wadset, could not entitle him
 "to any greater share in the division than what
 "corresponded to the wadset lands, either with
 "respect to the Earl of Home in case of redemp-
 "tion, or with the other heritors."

Mortonhall again petitioned, and stated that the
 previous judgments had been pronounced on the
 footing that his and his predecessors' right to the

* This is the only interlocutor in the case which is reported. It
 was not appealed from.

lands had been only a wadset, but he had since discovered that it had been absolute and irredeemable, a crown charter having been granted in 1662 of the lands of Fogo, &c.; and, therefore, the possession of his tenants ought to have the same effect as if the Earl of Home had been proprietor.

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TROTTER
v.
MARCHMONT,
&c.

It was *answered* that no proof of this was produced. The crown charter proceeded only on the wadset, and did not bear to be "irredeemably," but simply "heritably;" while the expired apprising of the reversion, founded on by himself, showed that his right previously rested entirely on the wadset. But whatever the nature of his title might have been, the lands of Whinkerstones and Charterhall could have no right to a share of the Moor of Fogo, never having belonged to the family of Home, from whom the other heritors had already got rights of servitude; and, therefore, neither the Earl nor Mortonhall could grant to other lands new rights inconsistent with theirs. As to the possession, Mortonhall does not pretend that he had any prior to the wadset; and then being proprietor of both, the one could not prescribe a right of servitude over the other; *res sua nemini servit*. But even if it could be held that these lands were entitled to a share, this could not be to the prejudice of the other dominant tenements, but must come off the portion which had been allotted to Mortonhall as proprietor.

*Replied,—*That although it might be the case that neither the Earl nor Mortonhall could grant servitudes inconsistent with those previously existing, yet it did not appear that the introducing the lands of Whinkerstones, &c. was either posterior to those rights, or, if posterior, inconsistent with

1736. **TROTTER** them. The extent of those servitudes could only
 v. be ascertained by the use; and as Mortonhall's
 MARCHMONT, possession by his tenants, both of Fogo and
 &c. Whinkerstanes, was admitted, it followed that this
 was not inconsistent with them. They were thus
 distinctly limited and defined in their extent; and,
 therefore, cannot interfere with the proprietor's
 disposing of the residue, so long as he did not
 trench upon them.

Although it is true that *res sua nemini servit*,
i. e. that, holding Mortonhall to be proprietor of
 the Moor, he could not claim any interest *jure*
servitutis; yet his possession for forty years has the
 effect of limiting the other servitudes, and there-
 fore preserves to him the right in the remainder
 which is his, as part and pertinent of his property.

The court (17th July, 1731,) "found that Mor-
 tonhall had not proven the allegiance, viz. that
 "the lands of Charterhall and Whinkerstanes had
 "any possession or servitude in the Moor of Fogo
 "before he acquired the wadset from the Earl of
 "Home, and therefore adhered," &c. Commission
 was afterwards granted by the Lord Ordinary
 (19th February, 1732,) for dividing the common-
 ty among the heritors, "excluding from the division
 "the lands of Charterhall and Whinkerstanes."

Entered Jan.
 31, 1734.
 Amended
 Feb. 19, —

The appeal was brought from the interlocutors of
 the 8th January, and 31st December, 1723; the
 23d January, and 15th February, 1724; the 26th
 November, and 27th December, 1726; 6th
 February, 17th and 30th July, 1731; and 19th
 February, 1732; the 15th December, 1733, and
 18th January, 1734.

Judgment, After hearing counsel, "it is ordered and ad-
 Feb. 12, 1736. "judged, &c. that the said interlocutors of the

“ 15th December, 1733, and 18th January, 1734,
 “ be, and the same are hereby reversed ; and that
 “ so much of the other interlocutors complained of
 “ as exclude or tend to exclude the lands of
 “ Charterhall and Whinkerstanes from a share in
 “ the division of the common in question be, and
 “ the same are hereby also reversed ; and that the
 “ said other interlocutors in all other respects be,
 “ and the same are hereby affirmed : And it is
 “ further ordered, that the said Lords of Session do
 “ grant a new commission to divide the said Com-
 “ mon among the several heritors, producing their
 “ interests, including in the said division the lands
 “ of Charterhall and Whinkerstanes.”

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TROTTER

“
 MARCHMONT,
 &c.

For Appellant, *Duncan Forbes, William Hamilton.*

For Respondents, *James Erskine, A. Hume Campbell.*

1736.

NAIRN
v.
NAIRN, &c.

JOHN NAIRN of Greenyards, Esq. - *Appellant* ;
MARGARET, LADY DOWAGER NAIRN,
et alii, her creditors and heirs of }
entail. The Lord Advocate, on } *Respondents.*
behalf of his Majesty. - - - }

14th May 1736.

TAILZIE.—CLAUSE.—In an entail in favour of a daughter, *nominatim*, a clause ‘prohibiting the heirs female of the said Margaret, her body, or any other of the heirs male and of tailzie above written, (except the heirs male of the said Margaret’s body,) to sell,’ &c. found to debar the daughter from selling.

[Elchies, *voce* Tailzie, No. 5.]

No. 89. SIR ROBERT NAIRN of Strathord, (senator of the College of Justice,) having entered into a contract with John, Marquis of Athol, for the marriage of his daughter, Margaret, with one or other of the younger sons of the Marquis, bound himself to settle his estate, failing heirs male of his own body, on his said daughter and the heirs of the marriage. The contract contained a procuratory for resigning the estate in favour of himself, and the other substitutions, under the limitations of the intended entail, which contained the following clause: ‘And that it should nowise be lawful to the heirs female to be procreate of the said Margaret Nairn, her body, nor any other of the heirs male and of tailzie, before mentioned, succeeding in the said lands and estate, by virtue of the fore-said tailzie and substitution, (except the heirs

‘ male of the said Margaret, her body, in the then
 ‘ intended or other subsequent marriage, according
 ‘ to the provision and destination therein specified,)
 ‘ or any of them, to sell, annailzie, dispone, dilapi-
 ‘ date, or put away the foresaid lands and estate,
 ‘ or any part or portion thereof, nor to innovate or
 ‘ infringe the said tailzie, nor to contract debt,’ &c.
 under the sanction of strictly irritant and resolute
 provisions. ‘ Declaring, nevertheless, that the
 ‘ said restriction of innovating the said tailzie, con-
 ‘ tracting debts, or disposing upon the said estate,
 ‘ should be nowise extended to the heirs male of
 ‘ the said then intended marriage to be procreate
 ‘ between the said Margaret, and the said Lord
 ‘ George Murray, and failing of him, any other of
 ‘ his brothers whom she should happen to marry,
 ‘ and failing of the heirs male of the said marriage
 ‘ between them, to the heirs male of the said
 ‘ Margaret, her body, of any other subsequent mar-
 ‘ riage, who, and the heirs male-lineally descending
 ‘ of their bodies, should have power to use and dis-
 ‘ pone upon the said estate at their pleasure, pro-
 ‘ viding the said immunity and freedom were no-
 ‘ wise extended to the heirs female of the said
 ‘ Margaret, her body, nor remanent heirs of tailzie
 ‘ and provision before mentioned.’

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Upon the above procuratory Sir Robert obtained
 a crown charter, in which all the conditions and
 clauses of the entail were inserted; and upon his
 death his daughter Margaret was served and re-
 toured heir of tailzie and provision to him; and
 afterwards married Lord William Murray, fourth
 son of the Marquis of Athol.

1681.

1683.

Having contracted considerable debts, she en-
 tered into minutes of sale with the appellant re-

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garding a portion of the lands; but he declining to complete the bargain, on the ground that she was incapacitated for selling by the entail, the question came before the Court of Session upon a suspension of a charge of horning at her instance. She likewise raised a process of declarator, to have it found that she had a right to burden or alienate the estate.

The case was reported by the Lord Ordinary, when the Lords (January 2, 1736,) found 'That by the contract dated 12th April, 1676, and by the procuratory of resignation contained in the contract, dated 15th July, 1676, granted in implement of the said first contract, and pursuant to the powers therein reserved; and the infestment following on the said procuratory, Margaret, Lady Nairn, the charger and pursuer of the declarator, is not subjected to the prohibitory clauses *de non alienando et non contrahendo*; but that the said Margaret, Lady Nairn, has power to charge the estate with debts, and to alienate the same; and, therefore, decerned and declared in the declarator, at the instance of the said lady and her creditors against the defender, heirs of tailzie, and the officers of state, and found the letters orderly proceeded, and decerned.' This interlocutor was adhered to.

Entered Feb.
 18, 1736.
 Amended
 March 11,—

The appeal was brought from these interlocutors of the 2d and 31st January, 1736.

Pleaded for the Appellant:—1. The estate being limited to Sir Robert, and the heirs-male of his body, whom failing, to the respondent, Lady Nairn, and the heirs-male of her body, with several other substitutions, and *all* the heirs of entail, except the heirs-male of Lady Nairn's body, be-

ing expressly prohibited from burdening or alienating the lands, this prohibition must be so construed as to prevent her who is an heir of entail, from selling the lands, in prejudice of the other heirs.

2. As the respondent, Lady Nairn, is not expressly excepted out of the said prohibitive clause, the exception extending only to the heirs-male of her body, she must be prohibited from selling equally with the other heirs of entail. As it plainly appears to have been the intention of Sir Robert to preserve his estate in his name and blood, it cannot be presumed that he intended to vest an absolute power in Lady Nairn to defeat the entail. When he intended to give a power of selling, (as he did to the heirs-male of her body,) he gave an *express* power; but his having given no such power to his daughter shows plainly his intention that she should be bound by the prohibitory clauses, and excluded from any power of alienation, as well as all the other heirs-female.

Pleaded for the Respondents:—1. The prohibitory clause *de non alienando et non contrahendo*, is not directed against the whole heirs of entail; it commences only from the heirs-female of the Lady Nairn's body, and therefore she and the preceeding heirs are thereby put under no limitation, which undoubtedly they would have been by express words, if it had been so intended.

The subsequent words in the same clause, "nor any others of the heirs-male of tailzie succeeding in the said lands and estate," can refer to no others than the heirs succeeding after the heirs-female of the lady. This is likewise clear from the last part of the same clause, where it is declared, that the heirs-male of the lady's body may dispose

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of the estate, but with a proviso, that such power shall not be extended to the heirs-female of her body, "nor remanent heirs of tailzie above mentioned;" plainly importing that the prohibition in this clause was imposed only upon the heirs-female of the lady's body, and the subsequent heirs of entail who were to succeed after them.

Every other clause of the deed, the provisions of which apply to the heirs of entail, is expressly directed against the *haill heirs*, and not conceived in such limited words as "other heirs," or "remanent heirs" which occur in this clause.

2. The reason for excepting the heirs-male of the lady's body in this place was, because the whole heirs succeeding after her are comprehended in the preceding clause, with which this clause is connected; and as both these clauses prohibitory are joined in the resolute clause which follows them, therefore the issue-male of her body are excepted from the clause *de non alienando*, that they might be excepted from the effect of that resolute clause, in case of contravention. And this appears to have been the purview of Sir Robert; for, by the subsequent clause, the better to distinguish who were the heirs subject to this prohibition, he declares that the heirs-female of the lady's body, and "the remanent heirs of tailzie," *i. e.* subsequent to her heirs-female, were comprehended under that clause.

Judgment,
May 14, 1736.

After hearing counsel, "it is ordered and adjudged, &c. That the said interlocutors complained of in the said appeal be, and are hereby reversed; and it is hereby declared, that, by the contract of marriage of Margaret Lady Nairn, and by the procuratory of resignation contained

“ in the contract, and the infeftment following on
 “ the said procuratory, the said Lady Nairn is sub-
 “ ject to the prohibitory clauses *de non alienando et*
 “ *non contrahendo.*”

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v.

NAIRN, &c.

For Appellant, *Ch. Areskine, Ja. Erskine.*
 For Respondents, *Ro. Dundas, Will. Hamilton,*
W. Murray.

It would appear, that in this case, the entail, which had been made prior to the act 1685, was not recorded in terms thereof. Elchies, (*voce Tailzie*, No. 5.) says, that the case of Borthwick v. Borthwick was quoted, as decided in the House of Peers, (*supra* page 53,) in which it was found that an entail, although made before the act, was not effectual against creditors without being recorded. This point, however, is not founded upon at all in the appeal papers.

JOHN WALKINSHAW, *Appellant*;
 HIS MAJESTY'S ADVOCATE, *et alii*, *Respondents.*

9th June 1737.

FALSA DEMONSTRATIO.—Found that an attainder was not vi-
 tiated, although in the act the person was described by the
 name of Walkinshaw, instead of Wakinshaw, and as being “ of
 “ Scotstoun,” (the estate of his father,) although, at the time,
 he was not infeft in any lands.

[Elchies, *voce Falsa Demonstratio*, No. 1.—C. Home, No. 30,
 p. 56.—Mor. Dict. p. 4723.]

JOHN WALKINSHAW, son of William Walkinshaw of No. 40.
 Scotstoun, was partner in a mercantile house in
 Glasgow. Having been engaged in the rebellion,
 he was, by virtue of an act of Parliament of the 1st

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Geo. I. attainted of high treason, by the name and designation of "John Wakinshaw of Scotstoun."

In 1733 he obtained the royal pardon; and a question coming afterwards to depend between him and his former partners, it was argued by the latter that the copartnery had ceased at the date of the attainder, which necessarily had the effect of disabling him from continuing a partner. The Lord Ordinary found, "That upon John Walkinshaw's going into the rebellion, and from the time ascertained by the act of attainder, the society and company did cease and was dissolved as to the said John Walkinshaw, or any interest that could arise to him, or any other in his right, after that time."

Walkinshaw thereafter varied his plea, and maintained that the act of attainder founded upon could not affect him, in as much as the person attainted by it was John Wakinshaw of Scotstoun; whereas his name was Walkinshaw; and his proper designation, not "of Scotstoun," but "of Glasgow, merchant."

To this it was answered, that there is no such material difference between the two names as can amount to a misnomer; and he having, in consequence of the death of his father, become entitled to the estate of Scotstoun, he was properly designed by that addition.

The Lord Ordinary (10th July 1736) "found that there was no misnomer of the said act with respect to the name and designation of John Walkinshaw of Scotstoun, and therefore repelled the allegiance founded thereon."

The Court, (July 8,) adhered.

The appeal was brought from these interlocutors of the 10th June and 8th July 1736.

Entered
 Feb. 6, 1737.

Pleaded for the Appellant:—The two names are entirely different. In point of fact, there are several distinct families of each name in Scotland; and there are many instances in which the change or omission of a single letter would completely alter the name.

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WALKINSHAW

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Neither was the addition of Scotstoun a proper addition to denote the appellant. He was not infest in any lands, and had not right either to that estate or to any other. But infestments alone can give a right and title to such additions. His proper designation was "Merchant in Glasgow."

Pleaded for the Respondents:—There is a great difference between a material misnomer, where the description of the person outlawed evidently disagrees with the true character and description of the person against whom it is made use of, and an accidental mistake in spelling the name or surname, or in the addition of the person attainted, concerning whom there remains no uncertainty. In the first case, if the name, surname, or addition does not truly belong to the person against whom it is used, but may properly be applied to a different person, (which might be the case by the mere change or omission of a single letter, as in the names of Wight and Wright,) the attainer might not be effectual. But, in the latter case, where name, surname, and addition all truly belong to the party, a mere inaccuracy in writing or spelling the name can make no material error in the attainer; and, in the present case, the difference in the spelling could not possibly give occasion to any uncertainty, as the names are the same, and are always pronounced alike.

With regard to the addition, as the true desig-

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nation of the appellant's father was "of Scotstoun," and as he had died before the attainder, and left the estate to the appellant, his eldest son, the latter was properly designed, and commonly known by the addition of Walkinshaw of Scotstoun; for, by the custom of the country, proprietors take and have designations given to them from their lands, whether purchased or succeeded to, and without regard to infeftment being taken or not.

Judgment,
June 9, 1737.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the said interlocutors complained of be, and the same are hereby affirmed."

For Appellant, *W. Noel, W. Murray.*

For Respondents, *Duncan Forbes, J. Strange.*

DR. GILBERT WAUCHOPE, and Ag- } *Appellants;*
NES his Sister, }
ANDREW WAUCHOPE of Niddrie, Esq. *Respondent.*

14th June, 1737.

SUCCESSION.—TUTOR and CURATOR.—MINOR.—Found that curators or administrators cannot directly alter the minor's or constituent's succession, by taking bonds secluding executors in lieu of bonds to heirs and executors, without the consent of the minor or constituent.

PROOF.—Circumstances under which parole evidence was allowed to prove the knowledge and consent of the minor.

[*Elchies, voce Minor, No. 6.—voce Succession, No. 2.—voce Tutor and Curator, No. 7.*]

No. 41. ANDREW WAUCHOPE of Niddrie, a minor, executed a deed with the consent of his curators, whereby

he appointed them, and two other persons, commissioners for the management of his whole affairs during his absence from Scotland.

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Amongst other powers thereby conferred on these commissioners, they were authorised “to remove and put in factors and baillies, and to give warrants, orders, and directions to his stewards and others, in whose hands his money accruing, or which should thereafter accrue to him from his said estate, was or should be lodged, for lending out and employing the same; to remove and put in tenants, and grant leases; to receive vassals, and generally to subscribe all and sundry assignments, acquittances, discharges, and other writings that required his subscription during his absence, and to manage his whole other affairs; and to pursue and defend in all actions, command, transact, and agree thereanent, and all other things requisite concerning the premises to do, use, and exercise as fully and freely as he with consent of his curators could have done if personally present.”

Shortly after the commissioners had commenced acting under this trust, they entered the following resolution in their sederunt book. “*Item.* The said commissioners appoint such of the bonds as are moveably conceived to be got renewed, including executors, so as to put them on the same footing with the rest of the bonds, and this to be done betwixt and the next compting, and all the bonds to be taken hereafter in these terms, &c.”

Various bonds were accordingly renewed in terms of this minute.

Mr. Wauchope never returned to Scotland, but

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died in Italy—a minor. He was succeeded by the respondent.

Dr. Wauchope, (appellant) having confirmed executor *qua* nearest of kin to his nephew, raised an action against the heir for payment of the sums contained in these bonds, as part of the executry, on the ground that the commissioners had no power to alter the succession of the deceased by any act or deed of theirs, having the effect of directing that money which by law descended to the executors, should go to the heir.

In defence, it was stated, that the money belonged to the heir and not to the executor, having been secured to the minor, his heirs and assignees, excluding executors, upon bonds taken by the commissioners, who had ample power to do so.

After some proceedings, the commissaries, (20th January 1735,) “repelled the defences in respect of the answers, and ordained the defender to depone and exhibit.”

The cause was advocated by Niddrie, who maintained that the commissioners having a power to direct the lending out of the minor's money, must necessarily have had a power to regulate in what form the securities should be taken. But supposing that such a power had not been given by express words, yet their proceedings having been never challenged, but acquiesced in by their constituent, his consent and approbation must be presumed. In support of this, a letter was produced, addressed to one of the commissioners by the minor when at Eaton School, in which he expressed generally his approbation of his commissioners, and of their management of him and of his affairs.

Upon the report of Lord Newhall, Ordinary, the court, (29th January 1736,) “ allowed Andrew “ Wauchope, now of Niddrie, to bring what further “ proof he can by witnesses or otherwise, for in- “ structing that the last Niddrie was informed of “ the resolution of his commissioners for taking all “ his bonds, secluding executors, and his approba- “ tion thereof ; and granted diligence.”

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Witnesses were examined, by whose testimony it appeared that the commissioners had given directions to Niddrie’s uncle, (Mr. James Wauchope,) to inform him of this particular measure ; and Mr. Waddell, his tutor, deponed that he saw a letter which Niddrie received from Mr. James Wauchope, acquainting him that his commissioners had come to a resolution to lend out his money upon bonds, secluding executors ; and that Niddrie expressed his approbation of it, declaring his desire that his moveable property should go with the land estate for the sake of the family.

The Court (27th July,) “ found that there is suf- “ ficient evidence of the late Mr. Wauchope of “ Niddrie’s knowledge and approbation of the com- “ missioners’ resolution and appointment of the 6th “ February 1721, that all their constituent’s money “ lent out upon moveable bonds, should be called “ in, and given out or lent upon heritable security, “ either upon infestments, or upon bonds, seclud- “ ing executors ; and therefore found that the said “ bonds thereafter renewed or taken by the com- “ missioners secluding executors, descend to heirs, “ and that they cannot be claimed by his execu- “ tors.”

This interlocutor was adhered to. (10th Dec.)

The appeal was brought from the several interlocu-

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tors of the 29th January, 27th July, and 10th December 1736.

*Pleaded for the Appellants:—*The commission in question relates only to such deeds of common administration as could not be executed by the constituent himself, on account of his absence. It does not extend even to selling or purchasing land, and far less to the extraordinary powers of making a will or settling succession. If the commissioners had powers, as is pretended, by the general words of their commission, to alter securities at pleasure, they might have changed the real securities into personal, in the same manner as they altered the personal into real, and so have prejudiced the heir at law in the same way as in this case they have injured the executor. But by the law of Scotland, no tutor, curator, factor, or commissioner, can settle or alter the succession of the pupil or constituent; this implies an extraordinary power which can be exercised only by the pupil or constituent himself.

It manifestly appears that these bonds were not taken for the benefit of the minor. And as it has been found that the commissioners had no power to make that alteration in their nature, (the Court having founded their judgment expressly upon the minor's knowledge and approbation only,) it is clear that there is no sufficient evidence of his consent or approbation. There is no writing under his hand to that effect, and by the law of Scotland, parole evidence is never allowed in any matter concerning which a proof may be had in writing.

The evidence of Niddry's intentions of settling all his property one way, must go for nothing. Neither is such an intention probable by witnesses,

nor yet the *emissio verborum*, from which it is inferred. Then the letter cannot be founded on merely through Mr. Waddell's testimony. If it is intended to make it evidence, it must be produced, or else its tenor regularly proved. But as it is, the existence and nature of it rest solely on the evidence of one witness, which is not sufficient to prove any fact, and surely not to support so important a document as the settlement of an estate. Would such evidence have been sufficient against Niddrie himself, supposing that he were alive, and challenging some other act of his commissioners? It is clear that neither the evidence of Mr. Waddell, nor of any other man, would have tied down this letter on him; and if this would have been law in his case, the same must hold in a question with his heir or executor.

Pleaded for the Respondent:—The commissioners had a general and full power to direct the lending out the minor's money, and were at liberty to take securities for the same in what form they thought fit.

The evidence does not rest on the single testimony of Mr. Waddell, but upon a chain of facts and circumstances, *quæ fidem faciunt judici*. It is in vain to say that the fact of Niddrie's receiving the letter, is not probable by witnesses. His knowledge is made out by proving that instructions were given to inform him of the resolution of his commissioners, and that a letter to that effect was accordingly written and received by him; which is evidently stronger proof of his knowledge than the mere production of the letter could afford. When the resolution was made known to him, he expressed his approbation of it.

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Other circumstances corroborating this were proved, such as his general desire to aggrandise his family estate, evidenced by a will in which he left almost the whole of his personal estate to the heir of entail, and by his intention to do so, frequently expressed to those about him who were in his confidence.

Judgment,
June 14, 1737.

After hearing counsel, "it is ordered and adjudged, &c. That the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed."

For Appellants, *J. Strange* and *James Erskine*.

For Respondent, *Dun. Forbes* and *W. Murray*.

The import of this decision upon the first head under which it is reported, is not free from uncertainty. It was not found *expressly* either by the Court of Session or the House of Lords, that the act complained of was *ultra vires* of the commissioners; but this certainly appears to have been virtually decided, when they allowed a proof of the minor's acquiescence. In the reclaiming petition for Dr. Wauchope, (signed by Mr. R. Dundas) this is stated to have been the nature of the judgment; but in the answers signed by Mr. Areskine, (afterwards Lord Tinwald,) it is said that the question of law was entirely waved. In Lord Elchies' notes upon this case, it is said, "The Lords generally thought that administrators cannot settle their constituent's succession, though their necessary or reasonable deeds of administration may have the effect of altering the succession, as taking securities upon land, leading adjudications, lending money upon annual rent, (before the act 1641 as to heirs, and since that time *quoad jus mariti et relictæ*,) but they cannot make destinations of succession by secluding executors without the knowledge and consent of their constituents; though some seemed to differ as to that; but most of us thought that Niddry's knowledge of his commissioners' resolution in their sederunt book would be a good defence."

With regard to the competency of allowing a parole proof, his Lordship observes; "I and others thought his (the minor's) knowledge presumed from his letter in March 1722, and therefore gave a diligence for proving such knowledge even by witnesses; wherein we had the less difficulty, that it was only to support the express probation of all their resolutions in that letter; but Newhall differed."

MARQUIS of Lothian, *et alii*, *Appellants*;
HASWELL, *et alii*, *Respondents*.

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14th April, 1738.

BURGH ROYAL.—The meeting for election of magistrates of a burgh being held previous to the usual day, and without due notice, the election was reduced.

ACT 7, GEO. II. c. —Circumstances under which an election of magistrates was reduced as irregular and void.*

[*Elchies voce* Burgh Royal, No. 9.]

THE ordinary Town Council of Jedburgh consists No. 42. of twenty-five members, viz. the provost, four bailies, a dean of guild, a treasurer, fourteen merchant councillors, and four deacons. The first step in the annual election of magistracy, is the nomination of eleven merchant councillors and of four deacons, and the whole number form what is called the extraordinary council.

On the morning of 15th of September, 1737, the Marquis of Lothian, the appellant, (then provost) gave directions for summoning the council to meet at three o'clock that afternoon. A meeting accordingly took place, at which nineteen members were present; three were absent from the town, and the other three declined attending.

At this meeting the appellant proposed choosing the council for the ensuing year, and offered two

* See note at end of the report.

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lists of the eleven new councillors. Eleven members of the council present were for proceeding, and did accordingly elect the ordinary number of new councillors ; but the other eight opposed the motion, and separated from the rest.

On the 17th and 19th the eleven of the old council, with the new merchant councillors chosen at the last election, proceeded to the election of the four deacons.

On the 22d September a meeting of the whole members of the extraordinary council, including the new merchant councillors and the four deacons, took place. The provost then proposed that they should proceed to the election of the new magistracy, and that the votes of the new councillors and deacons should be received.

This was opposed, and a motion made to adjourn, which was agreed to by fourteen of the old councillors, viz. the eight who had dissented at the first meeting, and the six who had been absent. The eleven old councillors however, with the new councillors and the deacons, then proceeded to choose the magistrates and council for the ensuing year, and elected the Marquis of Lothian their provost. Mutual protests were taken—the fourteen of the old council protested against the whole proceeding, and the other party against the separation of the former, as contrary to the act of the 7th of Geo. II.

On the 23d, 24th, and 26th, the fourteen had meetings, and proceeded to elect the respondent, Haswell, as provost, and the other constitutional members of the new magistracy and council.

Mutual actions of reduction and declarator were

brought by the different parties before the Court of Session.

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Against the election of the appellant it was objected, 1. That the time for calling a council for an election must be after the 20th of September.

2. That notice of the election was only given on the morning of the 15th, whereas, by immemorial custom, and by an act of the Town Council of the 28th September, 1733, two days' notice previous to any meeting for extraordinary matters was necessary, and one day for ordinary meetings.

3. That the appellant was aware that some of the members of the council were absent from town when the meeting was summoned.

It was answered, 1. That there was no such rule, there being upon record an election of an earlier date than the present, viz. on 12th September, 1662.

2. That in the sixty-two previous elections only twenty-three appeared from the Council books to have been made by previous appointment. Had such previous notice been considered essential, it must also have been held necessary to have entered it in the books.

3. That the appellant, the Marquis of Lothian, having judicially declared, upon being interrogated by the respondents, that he was not aware of the absence of the three members, this evidence was to be held as conclusive.

The court (January 19th, 1738,) after a hearing in presence, "found the reasons of reduction relevant and proven, and reduced accordingly."

Against the election of the respondents it was objected, 1. That it was contrary to the act of the 7th of Geo. II. which enacts, 'that at the annual

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‘election of magistrates and councillors for burghs,
 ‘no magistrate or councillor, or any number of
 ‘magistrates or councillors, shall for the future,
 ‘upon any pretence whatever, take upon him or
 ‘them to separate from the majority of the magis-
 ‘trates or councillors, but shall submit to the elec-
 ‘tion made by the majority of the Town Council
 ‘assembled; and it is provided that, if the minor-
 ‘ity shall proceed to a separate election, their act
 ‘and election shall be *ipso facto* void.’ As the
 eleven members formed a majority of the meeting
 of the 15th of September, the proceedings of the
 other party fell under the above nullity.

Answered :—1. This act does not affect the pre-
 sent case. The meeting on the 15th was not the legal
 meeting for the election; it having been held se-
 veral days before the usual day, and without due
 notice. The act could only have reference to a
 separation from a majority at a legally constituted
 meeting. Moreover, the pretended election was
 not made by the majority of the magistrates and
 counsellors of the preceding year; whereas the
 election of the respondents was upon the usual
 day, and by a majority.

2. That the two days previous notice, the ne-
 cessity of which was insisted in by the respond-
 ents, had not been given to the appellants, only
 one day’s intimation having been made.

3. That by the constitution of the burgh, trades-
 men were disqualified from being elected mer-
 chant counsellors, whereas six of the fourteen who
 separated from the appellants were tradesmen, and
 consequently unqualified, so that the remaining
 eight could not form a quorum. It was also ob-
 jected that two of the new-elected merchant coun-

sellors were tradesmen, and therefore also disqualified.

4. That a certain number of deacons formed a constituent and necessary part of the extraordinary meeting for the election of the new magistracy, whereas at the meetings of the respondents for this purpose no deacons were present.*

The Court 'repelled the objection founded on 'the act of parliament, in respect this case does 'not come within the same.'

With regard to the other objections, the Court (8th and 16th February) repelled them, except with regard to the two new merchant counsellors, and assoilzied the respondents. The objection to the six old merchant counsellors, viz. that they were tradesmen, was repelled, 'in respect they 'were not chosen counsellors at the election quar- 'relled, but at Michaelmas 1736, or preceding 'election, for reduction whereof no action was 'brought within the time limited by law ;' but the objection to the two new merchant counsel- lers, was sustained, 'in respect, it was admitted 'that they were members of the incorporated 'trades, who are not capable of being elected in- 'to the magistracy or council,' and the objection as to them was brought forward in due time.

The appeal was brought from the interlocutors of the 19th January, and of the 1st, 8th and 16th February 1738.

Pleaded for the Appellants :—1. The meeting and election of the 15th September took place at a time justified by precedents, and was conform- able to the constitution of the burgh.

* Some other objections were pleaded, but it appears unnecessary to detail them.

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2. The objection to the election of the respondents, founded upon the act of the 17th Geo. II. ought not to have been repelled, because they separated from a majority of the town council assembled, and proceeded to a second election, although the majority was greater than was requisite to make up a quorum of council. It is absurd to maintain that the separation must be from such a number as must make up a majority of the whole constituent members. Such a construction would render the statute useless, because the minority, which should separate from such a majority, could never amount to a quorum qualified to act; and the double election; in the present case, is productive of every mischief which was intended to be remedied by the statute.

3. As the objection of being incorporated tradesmen has been found good against two of the new merchant counsellors, it ought also to have been sustained against the six members of the old council, as it was in virtue of the election in 1737 that these persons pretended to a place in council at the election in question, and not by virtue of the election in 1736.

Pleaded for the Respondents:—The meeting for the election of new counsellors has always been held on the 21st day of September, or between that day and the 28th, and not sooner; and the only case referred to by the appellants where an earlier meeting took place, was owing to very peculiar circumstances: so that the object of the meeting on the 15th, to elect magistrates contrary to the opinion of the real majority of the old council, was very obvious.

From the records of the council, and the exa-

mination of witnesses, it appears that the meeting for choosing new counsellors has generally been fixed by the appointment of a previous council, and this ought more particularly to have been done in the present case, when the meeting was so much earlier than common, and where there was an act of council of 1733, requiring previous notice.

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2. As to the election of the respondents, it appears,

First, That if the proceedings of the appellants on the 15th and subsequent days were irregular, as the Court of Session have found, the respondents were regularly elected, for they were chosen by a majority of the electors, viz. fourteen members, agreeably to the constitution of the borough, and the practice in similar cases.

Second, That after the protest taken by the fourteen members on the 21st of September against the irregular proceedings of the appellants, the latter had no right to proceed to the election; and if any of the parties had acted contrary to the provisions of the 7th of Geo. II. it was the appellants, who, notwithstanding the meeting was adjourned by the majority, had continued to act, and to proceed to an election.

Third, Although there may have been valid objections against some of the persons elected by the respondents, that will not affect the validity of the general election, which must stand good if it has been regularly carried on.

After hearing counsel, 'it is ordered and ad- Judgment,
'judged, &c. that the interlocutors of the Lords of April 14, 1738.
'Session of the 19th January last, whereby the
'election of the appellants was reduced at the

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' suit of the respondents, be affirmed; and it is
' declared that the election of the counsellors and
' magistrates for the borough of Jedburgh, insist-
' ed on by respondents, were irregular and void;
' and it is therefore further ordered and adjudged,
' that the same be reduced, and that so much of
' the other interlocutors complained of whereby
' the Court of Session decerned in the declarator
' at the instance of the respondents, and assoilzied
' from the reduction at the instance of the ap-
' pellants, with regard to all the elections there-
' by quarrelled, (excepting those of Robert Win-
' terup and George Scougald, the two tradesmen,)
' be reversed.'

For Appellants, *Ch. Areskine, W. Murray.*

For Respondents, *W. Hamilton, J. Browning.*

It does not appear upon what precise ground the House of Lords reduced the election of Haswell. If it be held that the interlocutor of the 1st February was reversed to the effect of finding that the act of 7th Geo. II. applied, then the inference from the decision would be, that, where a minority of a town council separated from the majority at a meeting for the election of magistrates, their proceedings fell under the act, although it had been found that the original meeting was not legally constituted, and the election by the majority had in consequence been set aside. But other objections were pleaded, any one of which may have been the ground of the judgment.

JEAN BURDEN, Widow of JAMES	}	<i>Appellant;</i>
KINROSS, - - - - -		
DAVID SMITH, - - - - -		<i>Respondent.</i>

27th April, 1738.

MUTUAL CONTRACT.—SUCCESSION.—A provision in a marriage contract of certain sums in favour of the wife, failing children, or in the event of their deaths in minority and unmarried,—

found to be a proper *jus crediti*, and not a right of succession.

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LEGACY.—Found that a legacy to a person, his heirs, executors, and assignees, depending upon an uncertain condition, does not lapse by the death of the legatee, before the condition is purified.

Found that a legacy in these terms does not vest in the legatee so as to bestow on him any transmissible right, but that on the condition being purified, it vests for the first time in the person of his executor.

LEGITIM.—Found that the claim of legitim was not cut off by deathbed or gratuitous deeds, although the whole stock and conquest were provided to the children of the marriage, it not being declared that this was in satisfaction of the legitim.

[Elchies *voce* mutual contract, No. 7. *Voce* succession, No. 5.]

By marriage contract between John Burden and No. 43. Margaret Fullerton, (1st Sept. 1709) the former, in consideration of a sum received as marriage portion, provides the sum of 7000 merks to himself, his wife, and the survivor in liferent, and to the children of the marriage in fee; and the conquest is provided in fee to the children, and one half of it in liferent to the wife; and in case of no children surviving the husband, or in case of their dying before majority or marriage, the fee of the equal half both of the 7000 merks, and of the conquest, and the liferent of the whole of the latter is provided to the wife. The issue of the marriage were Charles and Clementina.

On the 23d May, 1722, John Burden executed on death-bed a disposition of all his property, real and personal, in favour of his son, whom failing to his daughter, subject to the provision in favour of the wife, contained in the marriage contract; and in the event of their decease before marriage, or ma-

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majority, he binds himself to pay to his wife, if she should happen to survive them, the sum of 6000 merks.

On the following day, (May 24,) John Burden executed another deed, by which, in the event of the death of his two children before majority or marriage, he binds himself, his heirs, &c. to pay to the persons after named, their heirs, executors, and assignees, certain sums of money, among which there is the sum of 8000 merks provided to his wife, over and above what she was entitled to by her marriage contract, and by the deed executed by him on the preceding day.

John Burden died soon after, as did also his son Charles, (in minority) and Clementina succeeded to the property. Margaret, his widow, intermarried with David Smith, and by the marriage contract she assigned to him all the provisions contained in her favour in her former contract, and in the subsequent deeds above mentioned.

By a subsequent general disposition, Mrs. Smith assigned to her husband all debts, sums of money, &c. that were then due, or which should be due and owing to her at the time of her death; and she appointed him her sole executor and universal legatee. She died soon after. Clementina, her daughter, survived her, but died unmarried and before attaining majority.

Jean Burden, sister to John Burden, was confirmed executrix to him, and to Charles and Clementina Burdens, his children. She likewise obtained from the heir at law of Mrs. Smith, a conveyance to whatever estate, real or personal, he might be entitled to. Thereupon she instituted an action of count and reckoning against Smith.

In defence, it was pleaded that, by the assignation and general disposition in his favour by his wife, he was entitled, 1st, To the half of the 7000 merks which had been provided to his wife in the event which happened, of the children of the marriage dying before majority or marriage. 2dly, To the half of the property acquired during the marriage; and, 3dly, To the sum of 8000 merks provided to his wife by the deed of the 24th May, 1722.

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The court, upon the report of the Lord Ordinary, Feb. 19, 1738. found, upon the first point, 'That the said Margaret Fullerton, by the foresaid contract of marriage, was a creditor, and not an heir substitute for the half of the 7000 merks, and for the half of the conquest.'

Thereafter, (19th June) their Lordships found 'That, by the general disposition by Margaret Fullerton to David Smith, likewise nominating him her sole executor and universal legatee, he had right to all debts, comprehending conditional debts, whereof the condition had not then existed, as well as others; and found that the 8000 merks contained in the conditional obligation of the 24th May doth belong to David Smith, her assignee, although she died before the condition did exist or was purified.' Both these interlocutors were adhered to.

The cause being again heard before the Lord Ordinary, it was insisted by the pursuer, that Charles and Clementina Burden having survived their father, were thereby, in their own right, entitled to the legitim; and as the father could not prejudice that by any gratuitous bond, or by a deed on death-bed, she, as executrix to them, was entitled to be

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paid their share out of the estate, before any thing could be claimed by the defender. It was answered that, as the father had made a more advantageous provision for them, by giving them all his estate, both real and personal, their tutors were justified in accepting the same; and that, as the children could not challenge this act of their tutors, it being for their advantage, and not to their prejudice, neither can their representative do so. The court, upon the report of the Lord Ordinary, (13th February 1736,) found "That there was no place for legitim in this case;" and their Lordships afterwards adhered, (24th February.)

The appeal was brought from several interlocutors of the 19th February, 19th June, and 19th July, 1735, and 13th and 20th February, 1736.

Pleaded for the Appellant:—1, With regard to the 7000 merks and half the conquest; had the marriage contract been fulfilled, and the 7000 merks and conquest been settled in the manner covenanted, Margaret Fullerton being thereby only an heir substitute to her children, and during their life having nothing but a bare possibility of succession, could no more convey this than an heir substitute could convey his chance of succession before he has succeeded. But even if she had this power, she did not exercise it *habili modo*; because, by the terms of the general disposition, all that she conveyed was the debts which were then owing, or which should be owing to her at the time of her decease; and as neither of these provisions were owing either at the date of the assignation, or at the time of her death, they could not be carried by the assignation.

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2. With regard to the 8000 merks, the father had no right to encumber the estate, (which, in terms of the marriage contract, became vested in his children by his death,) with the payment of this sum; but supposing he had this power, the legacy to Mrs. Smith of the 24th May, being only conditional, and she having died before the contingency happened upon which it was given to her, it never could vest in her, but must be considered as a lapsed legacy.

3. With regard to the right of legitim;—even if the half of the 7000 merks, and of the conquest, and the 8000 merks claimed by the respondent, were assignable, and had been assigned *habili modo*, to the respondent, or could have been claimed by him as executor nominate of Margaret; yet the children who died under age, and after their death, their heir (the appellant) had a title to the legitim, which the father had no power to diminish either by death-bed or gratuitous deeds,

Pleaded for the Respondent:—1. Mrs. Smith could not in any sense be considered as a substitute or heir of provision. By the terms of the marriage contract, the husband bound himself and his heirs, to secure the 7000 merks, and of the conquest to his wife and her heirs, in case the children died before attaining majority or marriage, and in that case he expressly assigns the same to her and her foresaids. She could not have taken up this provision by a service, but was a conditional creditor in it, and having by her marriage contract, and by the general disposition, assigned it to the respondent, and appointed him her residuary legatee; he now stands in her place and is entitled to the provision, the condition being now purified by the

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death of both children before majority or marriage.

2. The respondent has right to the 8000 merks also. In the *first* place, it was not a legacy, but a conditional obligation. The father bound himself and his heirs, to pay to Margaret Fullerton, and her heirs, executors, and assignees this sum, in the event of his children dying before attaining majority, or unmarried; and this event having happened, she, and now her assignee is entitled to it. The distinction in the words made use of in the two deeds of the 23d and 24th May, shows clearly that the testator did not intend to make the payment of the 8000 merks dependant upon her survivance. In the deed of the 23d May the 6000 merks are provided to the wife, not merely in the case of the children dying unmarried and under age, but also in case Margaret shall happen to survive them, which event not having happened, she was not entitled to the provision; but in the deed of the 24th May, (by which the 8000 merks is provided) no such condition is mentioned, which shows that she was to be entitled to the provision whether she survived them or not, provided they died under age, and unmarried. But *secondly*, even if it were a legacy it would not lapse, because it was given to Margaret, her heirs, executors, and assignees; in which case, such heir, upon the death of the legatee, becomes entitled to the legacy when the condition is purified.

3. Although the children were entitled to legitim, yet their father having made a more advantageous provision in their favour, this must be considered as coming in the place of it; and the appellant cannot now, in the name of the children, have any claim to such legitim.

After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutor of the 19th February, 1735, whereby the Lords of Session found 'that Margaret Fullerton the wife, by the contract of marriage passed between her and John Burden, her first husband, was a creditor, and not an heir substitute for the half of the 7000 merks, and the half of the conquest;' be, and the same is hereby affirmed, with this addition, viz. 'and that the respondent Smith is entitled to the said half of the said 7000 merks, and half of the conquest, under the general disposition from Margaret his wife; and that the children of the said marriage were entitled to the other half of the said 7000 merks, and also to the other half of the conquest;' and that the said interlocutor of the 19th June, whereby the Lords found 'that by the general disposition by Margaret Fullerton to David Smith, likewise nominating him her residuary legatee, he had right to all debts, comprehending conditional debts, whereof the conditions had not then existed, as well as others, and found that the 8000 merks contained in the conditional obligation of the 29th May, 1722, granted by John Burden to his wife, payable to her, her heirs, executors, or assignees, doth belong to David Smith, the assignee, albeit she died before the condition did exist or was purified,' be, and the same is hereby reversed; and that so much of the said interlocutor of the 19th July, whereby the said Lords of Session "adhered" to the interlocutor of the 19th February, be, and the same is hereby affirmed, with the addition herein made to the said interlocutor of the 19th February; but that so much of the same inter-

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"locutor, whereby the Lords adhered to the inter-
"locutor of the 19th June, be, and the same is
"hereby reversed ; and that the interlocutor of the
"said 10th February, whereby the said Lords of
"Session found ' that there was no legitim in this
' case,' be, and the same is hereby reversed ; and
"it is hereby declared, that the said children were
"entitled to a legitim in this case ; and it is here-
"by further ordered and adjudged, that so much
"of the said interlocutor of the 20th of the same
"February, which is contrary to, or inconsistent
"with, this judgment, be, and the same is hereby
"also reversed ; and it is further ordered, that it
"be remitted to the said Lords of Session to pro-
"ceed accordingly."

For Appellant, *Ch. Areskine, W. Murray.*

For Respondent, *W. Hamilton, J. Graham.*

The MAGISTRATES of MONTROSE, - *Appellants ;*
DAVID ERSKINE of DUN, Esq. one }
of the Senators of the College } *Respondent.*
of Justice, - - -

12th May, 1738.

PROCESS.—APPEAL—It being objected that the Lord Advocate, who had an interest in the cause, and who had been a party in the Court of Session, was not made a party to the appeal ; and that the cause had not been finally determined in the Court of Session ;—the appeal was dismissed.

No. 44. JAMES V. by a charter under the Great Seal, granted to Sir James Erskine of Brechin, his heirs and assignees, the right of Constabulary of the Burgh

of Montrose. Sir Thomas conveyed it to Mr. Erskine of Dun, the ancestor of the respondent.

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The office not having been exercised for a considerable period, and the respondent's right to it, as well as the nature and extent of the jurisdiction being disputed by the magistrates of Montrose, he, in 1728, brought an action for having his right to the said office, with all its privileges, ascertained and declared.

In defence it was, *inter alia*, pleaded that the grant, being of an office in fee, was void in terms of an act of James II. (1455, c. 44.) "That there be nae office in time to come given in fee and heritage, and that the offices that are given since the decease of our Sovereign Lord that dead is, be revoked and annulled."

It was answered that the statute founded on had gone into desuetude, there having been several offices granted in fee since that time; but at all events, that the objection was not competent to the magistrates, but only to the crown, who was not a party to the process.

The Lord Ordinary (July 8, 1730,) "repelled the defence founded upon the Act of James II. concerning jurisdictions *in hoc statu*, the crown not being in the process."

The magistrates afterwards raised a summons for the purpose of calling the Officers of State on behalf of the crown; and they likewise brought an action of declarator to have it found that the burgh of Montrose was exempted from any jurisdiction of the respondent.

The actions being conjoined, the Lord Ordinary, after various proceedings, pronounced an interlocutor, which was adhered to by the Court, (14th Fe-

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bruary 1733,) finding that the respondent "had right to the constabulary of Montrose, with all rights and privileges thereto belonging." And the cause being remitted to the Lord Ordinary, to hear parties on the extent of the jurisdiction, his Lordship (July 4,) "found and declared, that the pursuer hath right to a jurisdiction in matters of riot within the town of Montrose and liberties thereof, cumulative with the town, in such cases wherein, by their erection, they have power to judge; and that he hath right to the town prison or tolbooth, to imprison delinquents in."

Thereafter the respondent was ordered to give in a condescendence of what further points of jurisdiction he claimed, which being lodged, the Lord Ordinary, (22d February 1734,) "allowed the council for the town to see and answer the same against the 1st June next; but allowed the pursuer to extract the decree already pronounced," &c.

Entered
 Feb. 16, 1737.

Before, however, these answers were lodged, or any farther proceedings in the case took place, the present petition of appeal was brought from various interlocutors prior in date to that of 22d February above-mentioned.

Judgment,
 May 12, 1738.

The council for the appellants being directed to proceed, the respondent's council objected thereunto, and acquainted the House, 'That notwithstanding the interest of the crown was concerned, yet his Majesty's Advocate for Scotland was not made a party to the said appeal.' And the appellants' counsel having been heard thereunto, the counsel were directed to withdraw. "And it appearing to the House, 'That though the interest of the crown was concerned, and his Majesty's advocate made a party below, yet the

* said Advocate is not made a party to this ap-
 * peal; nor was the cause finally determined by
 * the said Lords of Session :'

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" It is therefore ordered, &c. That the said pe-
 " tition and appeal be, and is hereby dismissed
 " this house; and that it be, and is hereby remit-
 " ted to the Court of Session in Scotland, for that
 " Court to proceed in the cause according to law
 " and justice, and to determine thereupon, with
 " respect to the points which remain undetermin-
 " ed, and that afterwards the parties on either side
 " be at liberty to appeal to this House, as they
 " be advised."

GEORGE, MARQUIS of Annandale, - *Appellant* ;
 The EARL and COUNTESS of Hopetoun, *Respondents*.
et è contra.

15th February, 1739.

MUTUAL CONTRACT.—PASSIVE TITLE—ACT 1695, c. 24.—Cir-
 cumstances of an obligation incurred by an apparent heir,
 under which the next heir, passing him by, and serving to a
 remoter ancestor, was found liable, without relief against the
 executry, or other separate estate of the apparent heir.

[Elchies, No. 12—*voce* Mutual Contract.]

JAMES, Marquis of Annandale, succeeded to the No. 45.
 title and estate of Annandale in 1721. Shortly
 afterwards, by the death of his younger brother
 William, the succession to the maternal estate of
 Craigiehall opened to his sister, the Countess of
 Hopetoun, who was the first substitute then in ex-
 istence. But the right of the Countess was de-

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feasible, upon the existence of a second son of her brother James. However, notwithstanding the Countess's right, Marquis James continued in possession of both estates in virtue of a mutual agreement, and in 1726 he executed a settlement of the estate of Annandale in favour of Lord Hope, her eldest son, with certain other substitutions.

In the event of Lord Hope's not succeeding to the estate, it was provided that the entail of Craigiehall should be registered, and that the Countess should be served heir of entail. On the other hand, she, with the consent of her husband, discharged the Marquis of all claims he had for the bygone rents, and assigned to him the rents for the year 1725, and all subsequent years during their joint lives ; but under certain conditions. Whence the present question arose, of which one was as follows :—" But if it should happen the said Marquis to have no heirs of his own body to succeed to him in the estate of Annandale, and that neither the Countess, nor any of her children, should happen to succeed to him in the estate of Annandale, then, and in that case, any person who should succeed to that estate, not being procreated of his body, should be obliged not only to refund to the Countess, and her foresaids, the said rents of Craigiehall ; to be received by the said Marquis during the joint lives of him and her, at the rate of L.450 yearly, with interest ; the rent of the year 1725, bearing interest from Whitsunday, 1726, and so forth as to subsequent years, but also the said heirs succeeding to the estate of Annandale, who should not be procreated of the Marquis's body, should be further bound to pay to the said Countess, and her foresaid, the

“ further sum of L.1225, or, at the option of the
“ Countess, a sum equal to half of the rents more.”

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Marquis James died in 1730 ; and, upon his death, Marquis George, the appellant, (his younger brother by a second marriage) brought an action of exhibition and reduction against Lord Hope, to set aside the said settlement of 1726, as made by a person who had never been feudally vested in the estate, so as to enable him to make the said deed ; and in this action, after a variety of procedure in the Court of Session, and in the House of Lords, he ultimately succeeded, and obtained decree setting aside the only feudal right to the estate of Annandale, which Marquis James had made up, and consequently also reducing the said settlement made by Marquis James in favour of Lord Hope. Upon this, the respondents brought the present action against the appellant for payment of the rents of the estate of Craigiehall ; viz. L.450 for five years, being the time Marquis James was in possession of that estate, from the year 1725, until his death, together with the interest, and likewise for the sum of L.1225, which was to be paid upon the same contingency. The pursuers insisted, that although the title of Marquis James had been reduced, yet, as he had the appearance of a title, creditors might contract with him *bona fide*, and they founded upon the act 1695, for obviating the frauds of apparent heirs. In defence, it was maintained that, although the appellant had served himself heir to his father Marquis William, who was a remoter predecessor than Marquis James, yet the debts in question were not of the description protected by the act, that they were voluntary, and not contracted for a valuable consideration ;

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and this was particularly the case with regard to the sum of L.1225, which had been agreed upon; and the appellant also maintained that, even supposing it to be a just debt, yet the other representatives of Marquis James, and especially the Countess of Hopetoun, his executrix, were also liable, and that he was entitled to relief against her.

Dec. 17, 1725. The Lord Ordinary found, 'That the defender (the appellant) was liable in performance of the articles of agreement libelled, not by virtue of Marquis James's feudal title, since that title had been reduced, but by virtue of the act 1695, as having passed by his immediate predecessor, Marquis James, (who was more than three years in possession) and as having served himself to a remoter predecessor; and found, that the articles of agreement was an onerous transaction, and therefore repelled the defence that the same was gratuitous, and did not fall under the said act: and in respect of the conception of the said articles of agreement, found the present Marquis, the defender, had no ground of relief competent to him against the executory, or any other separate estate belonging to the said Marquis.'

June 24, 1736. The Lords found, 'That notwithstanding the reduction of Marquis James's title, the onerous debts of the said Marquis may affect the estate of Annandale; and they adhered to the interlocutor of the Lord Ordinary, finding the transaction between Marquis James and the Earl and Countess of Hopetoun, an onerous transaction; but they found that in as far as the pursuer founded their claims upon the act of Parliament, 1695, relief was competent to the de-

‘ fender against the executory, or any other separate estate of Marquis James, as accords.

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‘ The Court (6th July, 1737) adhered as to the finding that the transaction in question was onerous, and that such onerous deeds affected the estate ; and remitted to the Lord Ordinary to hear parties upon the point of relief.’

R. & C. HOPETOUN.

Upon the report of the Lord Ordinary, the Court Jan. 31, 1738. found, ‘ that so far as the Marquis of Annandale is liable on the act, 1695, there is relief competent to him against the separate estate ; but found, that Marquis James, having stood infeft by charter and seisin, which infeftment was effectual to creditors, that he, having charged the present Marquis, the heir succeeding to him in that estate, in favour of the Countess ; that Lord Annandale had no relief against the separate estate.’

An appeal was brought by the Marquis of Annandale from those parts of the above interlocutors which found the transaction in question onerous ; and that he was liable to perform the same, by virtue of the act 1695 : and it also complained of that part of the last interlocutor, in so far as it found that, by reason of Marquis James’s feudal title, he had no relief against the separate estate.

Entered
Feb. 17, 1738.

A cross appeal was brought by the Earl and Countess of Hopetoun from those parts of the above interlocutor, which found that the appellant, the present Marquis, in so far as he was liable upon the act 1695, had relief competent to him against the separate estate.

Entered
March 20.

ON THE ORIGINAL APPEAL.

Pleaded for the Appellant (the Marquis :)—Marquis James never enjoyed the estate by any good

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feudal title. His infestment has been finally reduced. He therefore had no power to burden the appellant with debt, least of all to cut off his relief. The appellant does not represent him in any way; nor is he liable for any of his debts except such as may fall under the statute 1695.

Now the statute does not apply: for Marquis James did not enjoy the estate as apparent heir, but under a bad title, constituted by charter and seisin, which have since been reduced, and therefore the case is not within the act 1695. But, besides this, the respondent, the Countess of Hopetoun, was no creditor of Marquis James within the meaning of the act; for, as against him, she could never have made any demand; and, as against the appellant, her demand is not onerous, (*i. e.* for a valuable consideration, and such only are within the act,) but merely gratuitous and fraudulent, which appears from the nature of the transaction, and all the circumstances attending it.

Pleaded for the Respondents, (the Earl and Countess of Hopetoun:)—The debt claimed is for a full and valuable consideration. The Countess of Hopetoun had an undoubted right to the rents of Craigiehall from 1724, to the death of Marquis James; and those rents, having been received by the said Marquis, are, without doubt, a full consideration for the claim in so far as regards them. With regard to the sum of L.1225, this is also an onerous debt, being for the previous rents from 1721, when the succession opened, which would have amounted to a greater sum.

ON THE CROSS APPEAL.

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Pleaded for the Appellants, (the Earl and Countess of Hopetoun:)—The statute 1695, so far as it subjects the heir to the debts of the immediate predecessor, gives the creditor the same claim against the estate of the deceased debtor, as he would have had if the debtor had made up a regular feudal title. In that case, the next heir could neither contest the debt, nor have any claim of relief; and the present statute has not pointed out, or intended to give him any such relief. Besides, it being the evident intention of the deceased person, that his executor and other separate estate should be free, and the particular estate charged with the debt, it would be unjust and contrary to this intention, to allow the heir passing by his immediate predecessor to throw this burden upon the executry.

Pleaded for the Respondent, (the Marquis:)—The act 1695 was not passed for the sake of the debtor, nor for the relief of any separate estate belonging to him, but as a further security to fair and onerous creditors; and therefore if the heir, for the advantage of the executor, be obliged to pay a debt properly moveable, he has an undoubted claim of relief upon the executry, to which the debt properly belonged.

After hearing counsel, ‘it is ordered and adjudged, that such parts of the interlocutor of the 24th January, 1736, and 31st January, 1738, whereby it is found, ‘That in as far as the respondents, the Earl and Countess of Hopetoun, founded their claim upon the act of Parliament 1695, and the appellant was found liable on the said act, relief was competent to him against the

Judgment,
Feb. 15, 1739.

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“ executry, or any other separate estate of Mar-
 “ quis James,’ be, and are hereby reversed ; and it
 ‘ is hereby declared, that from the nature of the
 ‘ pursuer’s demand, and the frame of the articles,
 ‘ January 1727, no such relief is competent in the
 ‘ case to the appellant, the Marquis ; and it is
 ‘ farther ordered and adjudged, That so much of
 ‘ the interlocutor of the 8th February, 1738, where-
 ‘ by it is found ‘ that the said Marquis is liable to
 “ the respondents for the sum of one thousand,
 “ two hundred and twenty-five pounds sterling,
 “ over and above the five years’ rent, in terms of
 “ the libel and articles of agreement libelled on,’
 ‘ be, and the same is hereby reversed ; and it is
 ‘ hereby further declared, that the said appellant
 ‘ is not liable for the said sum of L.1225, or at the
 ‘ option of the said Countess, to such sum as should
 ‘ be equivalent to half of the rents of Craigiehall,
 ‘ to be uplifted and received by Marquis James, at
 ‘ the rate of four hundred and fifty pounds, men-
 ‘ tioned in the said articles, the same appearing to
 ‘ be gratuitous as to those particular sums ; and it
 ‘ is further ordered and adjudged, that the other
 ‘ interlocutors complained of, be varied, cassed,
 ‘ and rectified, agreeable to this determination ;
 ‘ but that the said interlocutors, in all other re-
 ‘ spects, be, and are hereby affirmed.’

For Appellant, *James Erskine* and *W. Murray*.
 For Respondents, *Ch. Areskine* and *J. Sharp*.

ALEXANDER DENHAM, Esq.	- - -	<i>Appellant;</i>	1739.
ARCHIBALD STEWART, Esq. (<i>alias</i>)	}	<i>Respondent.</i>	DENHAM
DENHAM,)			STEWART.

17th February, 1737.*

TAILZIE.—ACT 1685, c. 22.—The conditions and irritant clauses not being inserted in a general retour, found not to infer an irritancy.

[Fol. Dict. I. p. 490. Rem. Dec. I. p. 155, No. 79 and 80.
Mor. p. 7275.]

SIR WILLIAM DENHAM, in 1711, executed an No. 46. entail of his estate of Westshiells, whereby he resigns the lands, under strict prohibitory and irritant clauses of the usual nature, "in favours of, "and for new infeftments to himself and the heirs "male of his body; which failing, to Robert "Baillie and the heirs male of his body; which "failing, to Mr. Archibald Stewart, &c." Sir William died in 1712, without having executed the procuratory; and, upon his death, without heirs male, Robert Baillie, (thereafter Sir Robert Denham,) was served and retoured heir in general and of provision, in which general retour the conditions, prohibitions, and irritancies of the entail were not inserted. He possessed the estate till his death, whereupon a declarator of irritancy was raised

* This case is inserted here, having been accidentally omitted in the proper order of its date.

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DENHAM
v.
STEWART.

against his son, (the appellant,) by Mr. Archibald Stewart, the next substitute, on the ground that the general retour of Sir Robert Denham did not contain the conditions and clauses irritant of the entail; which omission, by the act 1685, c. 22, infers an irritancy.

Answered :—The clause of the act founded on applies only to titles actually made up in the lands, and not to general retours, which are no more than personal titles.

It was found, (15th July, 1725,) ‘that Sir Robert Denham, retouring himself heir of provision to Sir William Denham, maker of the tailyie, without repeating in the retour the provisions and irritant clauses of the tailyie, and brooking and enjoying the tailyied estate by virtue of the retour, does import an irritancy of the heir’s right.’ This interlocutor was adhered to.

In a second reclaiming petition, it was pleaded, that even if the irritancy were incurred it was purgeable, seeing that no damage had thereby occurred to the estate. The Court, (1st February, 1726,) on advising this petition with answers, found in terms of their first interlocutor, with the addition of these words, viz. ‘and having contracted debts after the said service, found that the defender cannot now purge these irritancies, and therefore refused the desire of the petition.’ This interlocutor was adhered to.

Upon this judgment, the pursuer (the respondent) entered into possession of the estate; whereupon the creditors of Sir Robert Denham; (the appellant’s father,) raised an action against him, (the pursuer,) to have it found that their debts were chargeable on the estate, notwithstanding the

entail, the prohibitory clauses not having been inserted in the retour. The Court of Session found that the estate was chargeable with these debts, but upon an appeal to the House of Lords, that judgment was reversed.*

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An appeal was thereafter brought from the above interlocutors of the 15th July and 18th Nov. 1725, and the 1st and — February, 1726, &c.

Entered
Jan. 26, 1736.

Pleaded for the Appellant:—The act compels insertion of the conditions of the entail “in the rights and conveyances” whereby the estate is possessed. These words mean only *real* rights, viz. charters and infeftments, which appear on record as the complete titles to the lands, and on the faith of which contracting creditors may rely. A general retour is not such a conveyance or real right; and has no other effect than as evidence that the person retoured has an undoubted right to make up a title to the entailed estate.

2. Such general retours are not uncommon, but are never considered to be a contravention of the entail.

3. By the judgment in the House of Lords, the estate was not exposed to Sir Robert’s creditors, and therefore this reason for holding possession on a general retour to be an irritancy, no longer exists.

Pleaded for the Respondent:—The only title by which Sir Robert Denham possessed the estate was this general retour; and therefore the omission in it of the conditions of the entail, is, by the express terms of the act, a contravention, incurring forfeiture.

2. Although in some instances, the irritant

* 5th June, 1733. Vide supra, No. 23.

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clauses of the entail may not have been inserted in the general retour, yet in all these the retour has borne a reference to the entail itself, but in the present case the retour is absolute, without mention of, or reference to, any entail containing irritancies. Further, whenever heirs of entail have expedite only general services, they have been careful not to possess in virtue of such retours, until they are completed by infestment.

3. Sir Robert's possession in virtue of his general retour, has left the estate exposed to his creditors. If this is sanctioned, there must be an end of all entails, because the heir of entail not only would never complete by infestment an entail which he wished to defeat, but would possess on a personal title, in order that he might charge the estate at pleasure.

Judgment,
 Feb. 17, 1737.

After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutors complained of in the said appeal be, and the same are hereby reversed; but that the respondent be at liberty to proceed before the said Lords of Session, in this cause, according to law, and the course of the said Court, for any irritancies founded upon in his libel, other than the irritancy alleged to arise from not repeating the provisions and irritant clauses of the tailie in the retour mentioned in the interlocutor hereby reversed."

For Appellant, *Duncan Forbes, W. Murray.*

For Respondent, *James Erskine, Robert Dundas, William Hamilton.*

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SIR HEW DALRYMPLE, - - - *Appellant* ;
 SIR ALEXANDER HOPE and MARY }
 BUCHAN, - - - - - } *Respondents.*

SIR HEW DAL-
 RYMPLE AND
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 v.
 SIR ALEXAN-
 DER HOPE.

MARY BUCHAN, - - - - - *Appellant* ;
 SIR HEW DALRYMPLE and SIR }
 ALEXANDER HOPE, - - - - - } *Respondents.*

27th March, 1739.

TAILZIE.—Under a substitution “ to the heir female of the body” of the entailor.—Found that the daughter of the entailor’s eldest son is entitled to succeed in preference to the daughter of the entailor, and to the daughter of a second son who died last seized in the estate.

[Elchies, *voce* Provision to Heirs and Children. No. 2.]

JOHN, LORD BARGENY, on the marriage of his No. 47. eldest son John, master of Bargeny, executed a settlement of his estate in favour of the said John, and the heirs male to be procreate of that marriage; whom failing, to the heirs male to be procreate of the said master’s body of any other marriage; whom failing, to William Hamilton, the second son of John, Lord Bargeny, and the heirs male to be procreate of his body; whom failing, to the heirs male to be procreate of the body of the said John, Lord Bargeny; whom failing, to the *eldest heir female of the body* of the said John, Lord Bargeny, and the descendants of her body, without division.

John, master of Bargeny, died in his father’s

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lifetime, and left issue, Joanna, the mother of Sir Hew Dalrymple.

Thereafter, John, Lord Bargeny, died, leaving issue, the said William Hamilton, and one daughter, Nicholas, the mother of Sir Alexander Hope. William made up titles to the estate, and died leaving issue, James and Grizel, mother of Mary Buchan.

James, Lord Bargeny, succeeded to the estate in 1736, and was infeft under the entail, but died, without issue; and with him the issue male of John, Lord Bargeny, failed; so that the succession devolved upon "the heir female of the body of John, Lord Bargeny, and her descendants, "without division;" and the question was, who was this heir female.

Sir Hew Dalrymple, and Sir Alexander Hope, each took out briefs, to have it found that he was heir of provision and entail to the said James, Lord Bargeny, and they then brought counter actions of declarator.

Jan. 16, 1736. The court, by their first interlocutor, found "that the estate did devolve to Sir Hew Dalrymple preferable to Sir Alexander Hope, and "decerned."

In the mean time, Mary Buchan appeared in right of her mother Grizel, (the daughter of William,) took out a brief, and brought her action of declarator; and the three actions were then conjoined. Sir Alexander Hope reclaimed against the above interlocutor, and pleaded, 1st, That the substitution being in favour of the eldest heir female of the body of Lord John the entailer, and her descendants without division, the words 'eldest heir female' were descriptive of the female that was

to take; and that his mother Nicolas, the only daughter of the entailor, was the female corresponding to that description, in preference to the daughters of his sons.

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But, 2dly, Even though by legal construction the daughter of the eldest son be considered the heir female, still the settlement must be construed by the intention of the entailor. This intention appears from the difference in the words of the substitution to "the eldest heir female" of his body, and to "the next heir female" of his body. In the obligation to infest, after the substitution "to the eldest heir female of his body, and the "descendants of her body," it follows, which failing, "to the next heir female to be procreate of "his body." Under the first clause, therefore, his daughter Nicholas, who was *then in existence*, must have been intended; and not his son's daughter, who was *to be procreate*.

Besides, in the law of Scotland, the term "heir female" is not known; and, therefore, it ought to be construed by the law of England, which, by heirs female, means only females connecting their descent by females, and, *in dubio*, the immediate daughter of the entailor ought to be preferred to the grand-daughter by a son.

Sir Hew Dalrymple answered, that the description of "heir female" of Lord John was applicable only to his mother Joanna, the daughter of the entailor's eldest son. She alone, on the extinction of heirs male, was his heir of line, or at law, under which character, neither the entailor's daughter nor the daughter of his son could claim.

On the other hand, Mary Buchan maintained that, by the course of succession founded on the

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forms of feudal tenures, when lands are disposed to the heir male of the body of the entailer; whom failing, to his heirs female,—the female who is to take, on failure of the males, is that female who is heir female, or heir at law of the male last seized, and not the female who is heir female, or heir at law, of the entailer.

The court (18th January, 1738,) found, “that by the conception of the entail, Sir Hew Dalrymple was called to the succession of the estate of Bargeny preferable to Mary Buchan;” and also found “that, by the conception of the entail, the succession to the estate of Bargeny devolved on Sir Alexander Hope, eldest son of the only daughter of John, Lord Bargeny; and that, therefore, he ought to be served heir of entail preferable to Sir Hew Dalrymple and Mary Buchan, and decerned.”

Mary Buchan reclaimed against this interlocutor, and, upon advising her petition, with answers, their Lordships adhered, (6th July) and thereafter (11th July) they found “that Mary Buchan ought not to be served heir of entail preferable to Sir Alexander Hope.

Entered
 Jan. 18, and
 Feb. 9, 1739.

An appeal was brought by Sir Hew Dalrymple from the interlocutor of the 18th Jan. 1738. An appeal was likewise brought by Mary Buchan from the same interlocutor, and from those of the 6th and 11th July.

Pleaded for Sir Hew Dalrymple:—This deed of entail must receive the legal construction, according to which the appellant’s mother was undoubtedly the *heir* of her grandfather, Lord Bargeny, and consequently the only person who could take by the description of “eldest heir female” of Lord Bargeny; for his daughter was not his heir,

nor can she be so, while there remains any issue of his eldest, or of his second son.

It is a mistake to say, that the term "heir female" is unknown in the law of Scotland. It never was before doubted, that where an estate is settled upon a man, and the heirs male of his body, whom failing, the heirs female of his body,—the term "heirs female" denotes the persons, who failing heirs male of his body, are his heirs of line, or heirs at law. Many instances were produced in the Court of Session from record, to show that the term "heir female" is usual in settlements, and in retours by juries; and other instances were given, where grand-daughters by an eldest son are in possession of the estates of their grandfathers in preference to his eldest daughter, by virtue of a substitution (failing heirs male) to the *eldest heir female of the body of the grandfather*, without division. In these cases, although the right of succession had been disputed upon other grounds, the legal construction of the term "heir female" never was contradicted by the daughter.

As to the supposed intention of the entailor, deduced from the terms of the obligation to infeft, this can be of no weight, for this difference in the words of substitution occurs only in the obligation to infeft, and not in the procuratory of resignation. In the procuratory, after the substitution to the eldest heir female of Lord Bargeny's body, and the descendants of her body, it is said whom failing to the next heir female of his body, without the words "to be procreate." If the words "to be procreate" had been thought of importance, they would have been inserted in the procuratory. But at any rate, if Lord Bargeny, by the term "heir fe-

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male," had intended, not his female descendant, who, on failure of issue male, would also be his heir, but his daughter Nicolas, who was then living, he would have called her to the succession by name, in the same way that he called his younger son William, and thus have distinguished her from the person who properly would be the heir female.

With regard to the appellant Mary Buchan, it is clear that she can have no claim. By the entail, upon failure of heirs male, it is not the heir female of the last possessor who is called, but the heir female of the entailer; and while there is issue by the eldest son, the issue of the second son never can be heir to the grandfather.

Pleaded for Mary Buchan :—Two errors have been committed by the Court of Session. 1st, The daughter of the father ought not to have been preferred to the daughters of the sons; and 2^d, the daughter of the second son, who was last seized, and had completed his title by charter and infeftment, ought to have been preferred to the daughter of the eldest son. For,

1st, By the course of feudal tenures which prevails in Scotland, though the first heir succeeding upon the entailer's decease must, in order to complete his title, be served heir to the entailer himself, who died last infeft in the estate; yet no subsequent heir, upon the death of a preceding heir who was infeft, can, by the forms of the law of Scotland, be again served heir to the entailer, but must of necessity be served heir to that person who was last infeft in the lands.

2^d, By the same law feus are masculine, and when the extinction of the male line happens in the person of an heir male, who had completed his ti-

tle by charter and infestment, the succession under a substitution "to the heirs female," or "heirs general," is understood to rest in the person of the heir female, or heir at law of such male, who thus died last infest, and not in the heir at law, or heir female of the entailor, or of any of the intermediate heirs male.

Pleaded for Sir Alexander Hope :—The term "heir female of a man's body," in its proper and legal signification, must, in the first degree, denote his daughter. A grand-daughter who succeeds, as standing in the place of a son, can no more answer the description of heir female than a grandson, who represents a daughter, does that of heir male. Where, in a marriage contract, the estate is conveyed to the heir male, it is a common provision to settle portions upon the heirs female of the marriage, meaning thereby the daughters.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal of the said Mary Buchan be, and is dismissed this House, without prejudice to any right that may hereafter accrue to the said Mary Buchan, or the descendants of her body, on failure of the heirs of tailzie mentioned or described in the settlement of the 19th June, 1688. And it is hereby ordered and adjudged, That that part of the interlocutor aforementioned, of the said Lords of Session, of the 18th Jan. 1737-38, whereby they found, 'That by the conception of the tailzie, the succession to the estate of Bargeny devolves on Sir Alexander Hope, eldest son of the only daughter of John Lord Bargeny, and that therefore he ought to be served heir of tailzie, preferable to Sir Hew Dalrymple and Miss Mary Buchan,' be, and the same

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“ is hereby reversed : And it is further ordered
“ and adjudged, That so much of the interlocutor
“ of the same Lords, of the 6th of July last, where-
“ by they adhered to their said former interlocutor,
“ be, and the same is hereby also reversed ; and it
“ is hereby declared, That the said appellant, Sir
“ Hew Dalrymple, is entitled to the estate in ques-
“ tion, upon the failure of heirs male of the body
“ of John Lord Bargeny ; and it is further ordered
“ and adjudged, that the interlocutor of the said
“ Lords of Session, of the 16th July, 1736, where-
“ by they found, ‘ That the estate of Bargeny
‘ doth descend to Sir Hew Dalrymple, of Castle-
‘ ton, eldest son to the daughter and only child of
‘ John, master of Bargeny, and that he ought to
‘ be served heir of tailzie and provision to James
‘ Lord Bargeny, preferable to Sir Alexander Hope,
‘ of Kerse, eldest son to the only daughter of John
‘ Lord Bargeny,’ be, and the same is hereby af-
“ firmed.”

For Sir Hew Dalrymple, *Wm. Noel, Ro. Craigie.*

For Mary Buchan, *Fr. Chute, Al. Lockhart.*

For Sir Alexander Hope, *Ch. Areskine, W. Murray, J. Graham.*

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SIR FRANCIS
KINLOCH,
&c.

HUGH MURRAY, Kinnynmound,
Trustee of the late Sir JAMES
ROCHEAD ; and JAMES DALRYM-
PLE, and DAVID KINLOCH. } *Appellants;*
Sir FRANCIS KINLOCH ; Sir JAMES
DALRYMPLE, *et alii*, - - - } *Respondents.*

29th March, 1739.

DEATH-BED.—MUTUAL CONTRACT.—Whether a renunciation by an apparent heir of his right to challenge *ex capite lecti*, granted to the ancestor while he was in *liege poustie*, be binding ?

Whether such a renunciation granted by two of four apparent heirs be binding on them, the other two not having acceded to the obligation, and the party obtaining it being thus prevented from fulfilling his part of the conditions of the contract ? *

Sir James Rochead of Inverleith, by deed of entail (1691,) settled his estates of Inverleith and Darnchester upon his son James, and the heirs of his body, whom failing, upon his four daughters. James was to be under the fetters of the entail, but if the succession opened to the daughters, they were to succeed as heirs portioners in fee simple. Magdalen, the eldest, was married to James Cathcart, Esq. ; Janet, the second, to Sir David Dalrymple ; Mary, the third daughter, to Sir Francis Kinloch ; and Elizabeth, the youngest, remained unmarried.

Sir James (the son) succeeded to these estates upon the death of his father, and having ac-

* It does not appear upon which of these two grounds the judgment of the House of Lords proceeded.

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quired other property, he was desirous of making an entail both of the old and of the acquired estates in favour of the same person. With this view, a contract was prepared by Sir James, which he wished all his sisters to agree to and subscribe, in order to free him from the restrictions, &c. of the entail, and to enable him to make a settlement accordingly.

By this contract it was provided, 1. That if Sir James Rothead should die without issue, then the said lands should stand charged with 120,000 merks, payable among the four sisters equally, and to such persons, as any of them, for their respective shares, should, by writing under their hands, appoint.

2. That if the said Sir James Rothead should die without issue, and without making any settlement of his estates, then the whole should fall and belong to his said four sisters, and to such persons as they should name, and failing of such nomination, to the heirs of their bodies.

3. That notwithstanding the foregoing clauses in favour of the said Sir James Rothead, and his said four sisters, yet the same clauses should no way hinder the said Sir James of his full power and free disposal of his real and personal estates, either in whole or in part, to any person or persons he pleased at any time, *etiamsi in articulo mortis*, and that without any of his said four sisters' consent, without prejudice to the foresaid possession of 30,000 merks to each of the said sisters.

4. That if any of the said four sisters should not subscribe this instrument, then she or they not subscribing, should have no power or share of his separate heritable or moveable estate, besides the

lands of Innerleith and Darnchester, but the same should accrue and belong to the sisters subscribing, and their heirs, unless the same shall be otherwise disposed of by the said Sir James Rochead.

This contract was signed, on the one part, by Sir James, and on the other by Janet and by Mary, and their husbands ; but it was not signed by Magdalene or by Elizabeth.

Upon the death of Magdalene in 1735, Sir James obtained a decree, (in absence,) in an action of declarator, (to which James Cathcart, the son of Magdalene, was made a party,) finding that the limitations in his father's settlement were personal in favour of his four sisters, and not in favour of their heirs, and that he might therefore dispose of Magdalene's share.

On 2d April, 1737, Sir James executed a disposition of all his acquired estates, and of three-fourths of the paternal estate, viz. the shares of Magdalene, Janet, and Mary, in favour of Murray and other trustees, for behoof of the sons to be procreate of the body of James Cathcart ; whom failing, for behoof of James Dalrymple, (grandson of Janet,) whom failing, of Francis Kinloch, second son of Mary.

Sir James died on the 1st of May following, within thirty days of the date of this settlement, having previously contracted the disease of which he died.

Thereupon the heirs at law of Sir James, viz. Mary, (with consent of her husband, Sir Francis Kinloch,) Elizabeth, the youngest sister, and the descendants of Magdalene and Janet, brought their several actions for reduction of this settlement, so far as their shares were concerned, on the head of death-bed. But a doubt having occurred whether

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James Cathcart, (the son of Magdalen,) and Elizabeth, were not barred from claiming as the heirs of law of Sir James, by the proviso in the contract in 1715, "that the sisters refusing to "subscribe the same should be excluded from the "succession to any part of Sir James's acquired "estates," they raised a reduction of this contract, on the ground, *inter alia*, that Magdalen and Elizabeth had not been made parties to it, and had not even been required to subscribe it; and in this action they obtained decree of reduction, so far as their rights of succession were involved, (26th January, 1738,) which was affirmed on appeal to the House of Lords, (18th April, 1738.)

To the action at the instance of Mary and her husband, and of the heirs of Janet, it was objected on the part of the trustees, that as Mary and Janet had agreed to the contract in 1715, and had accepted certain rights, qualified with a power to Sir James to dispose of the heritable estate *etiam in articulo mortis*; neither they nor their heirs could now be allowed to dispute the validity of the deed 1737, which was executed in virtue of that power.

Answered:—As the contract in 1715 has been found ineffectual to exclude the two sisters, who had not subscribed it, from their share in the succession, it can have no effect against the other parties to it, because the reason which induced them to subscribe was the hope of that advantage of which they are now deprived; (viz. the shares of those who should refuse to subscribe;) and the deed of settlement could not be good in part, and bad as to the residue; neither was it in the power of the heirs of Sir James to dispense

with the public law, by giving him power to dispose of an heritable subject on death-bed.

The Court found, (23d June, 1738,) that Sir Francis Kinloch and Mary his wife, and Sir James Dalrymple, (the son of Janet,) were not barred by the contract in 1715 from challenging the deed of 2d April, 1737, on the head of death-bed; and remitted the case to the Lord Ordinary.

Thereafter the Lord Ordinary, (27th June,) sustained the reasons of reduction libelled, viz. that Sir James had contracted the disease of which he died before executing the deed in question, and that he died within sixty days of its date, and allowed a proof.

The court adhered, (6th July,) and upon advising a proof they found the reasons of reduction proved, and reduced, &c. &c. (29th July.)

An appeal was brought by the trustees, and by James Dalrymple and Francis Kinloch, (the heirs under the settlement in question,) from these interlocutors of the 23d and 27th of June, and 6th and 29th of July.

Pleaded for the Appellants:—Although a man cannot, on death-bed, convey away his heritable property to the prejudice of his heir at law, yet where a conveyance of such estate has been made to the heir, reserving a power to alter *in articulo mortis*, and this has been accepted by the heir, he cannot challenge a posterior deed upon the head of death-bed. The sisters, therefore, having by the deed 1715, (by which they were in a certain event called to the succession,) empowered Sir James to dispose of his estate on death-bed, are barred from challenging the deed 1737.

Although the contract 1715 was set aside as to

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James Cathcart and Elizabeth Rothead, because they were not parties to it, this can have no effect with regard to Janet and Mary, who were parties to it and subscribed it; and the judgment of the Court of Session and of the House of Lords, was expressly confined to the shares of Magdalen and Elizabeth.

Pleaded for the Respondents:—1. The contract 1715, is void by non-performance on the part of Sir James Rothead; for it is a rule in mutual contracts, where conditions are to be performed *hinc inde*, that the contract must subsist, and be made effectual in all its parts, and non-performance in any one article resolves the whole.

2. No power of disposing on death-bed was given to Sir James Rothead by the contract 1715. It contains only a reservation of the powers previously competent to Sir James, and no more.

3. Though an heir may dispense with the law of death-bed by ratification of a particular deed, (the contents of which he knows,) no general power or consent given by him, antecedent to the making of such settlement, can bar him from making the objection.

Judgment,
29th March,
1739.

After hearing counsel, “it is ordered and adjudged that the said appeals be, and they are, hereby dismissed this house, and that the interlocutors complained of be, and the same are hereby affirmed.”

For Appellants, *Ch. Areskine, W. Hamilton.*

For Respondents, *R. Craigie, W. Murray, Alexander Lockart.*

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AND OTHERS
v.
BLAIR.

ARCHIBALD MURRAY, Advocate,
et alii, trustees for the creditors }
of WILLIAM SCOTT BLAIR, of } *Appellants* ;
Blair, - - - - -
HAMILTON BLAIR, Esq. - - - *Respondent*.

4th April, 1739.

CONJUNCT FEE AND LIFERENT.—A wife's estate being disposed in her marriage contract "to the husband and wife, in conjunct fee and liferent, and to the sons of the marriage; which failing, to the heirs male of the body of her father; which failing, to the heirs female of the marriage; which failing, to the heirs male or female of her body of any other marriage; which failing, to the husband, and the heirs male of his body of any other marriage; which failing, to the wife's heirs whatsoever;"—the fee found to be in the wife.

HEIR OF PROVISION.—Found that the heir of the marriage may gratuitously dispose of the estate conveyed in the marriage contract.

[Elchies voce Service and Confirmation, No. 5.]

WILLIAM BLAIR of Blair conveyed his estate to No. 49. his son John, and the heirs male of his body; whom failing, to the heirs male of his own body; whom failing, to his son John's heirs whatsoever. John was infest, and upon his death, Magdalen his sister, served herself heir to him, and was married to Mr. Scott.

By the marriage contract, Scott came under certain obligations on his part, and on the other hand, Magdalen agreed to settle the lands upon herself and husband, and longest liver, 'in conjunct

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‘ fee and liferent, and to the sons of the marriage;
 ‘ which failing, to the heirs male of the body of
 ‘ her father; which failing, to the heirs female of
 ‘ the marriage; which failing, to the heirs male
 ‘ and female of her body of any other marriage;
 ‘ which failing, to the said William Scott, and the
 ‘ heirs male and female of his body of any other
 ‘ marriage; which failing, to Magdalen’s heirs
 ‘ whatsoever,’ &c.

The only issue of the marriage was one son, William Blair, who, upon his mother’s death in 1733, took out a general service as heir to her; and having thereby acquired a right to the procuratory of resignation in his grandfather’s settlement, he procured a charter of confirmation thereon. He afterwards executed a settlement of the estate, in favour of himself and the heirs of his body; whom failing, of his half-brother Hamilton Blair, a son of Scott by a subsequent marriage.

In 1733, Scott became bankrupt, and made over to certain trustees for his creditors all the right which he then had, or should afterwards acquire, to the estate.

Upon the death of William Blair in 1734, these trustees charged Scott to serve heir in special to the estate, upon the above contract of marriage; and thereupon proceeding to adjudge, Hamilton Blair appeared, and pleaded,—That the estate could not be adjudged for his father’s debts, because it had been vested absolutely in William, who had settled it upon him, failing issue of his own body.

Answered:—1. That, by the construction of the words in the marriage contract, “conjunct fee and liferent,” the fee was vested in the husband;

a right of liferent in the wife ; and only a right of succession in the son : and as the latter had predeceased his father, he had no power to make a settlement of the estate.

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2. That at any rate, as the estate, failing issue of Magdalen, was by the marriage contract settled upon Scott, it was not in the power of William Blair, by any voluntary and gratuitous deed, to disappoint his right of succession.

The court, (19th July, 1736,) upon the report of the Lord Ordinary, “ Found that the fee of the “ estate was in the wife ; and that William, the “ son and heir of provision of the first marriage, “ could gratuitously dispose of the estate.”

This interlocutor was adhered to (30th July.) The appeal was brought from these interlocutors of the 19th and 30th July, 1736.

Entered
Feb. 6, 1739.

Pleaded for the Appellants :—Provisions of this nature in marriage contracts are by law considered as strictly onerous, and cannot be altered gratuitously by the parties themselves, or their heirs. In this case, the substitution in favour of the husband could not have been defeated by the voluntary deed of the wife ; nor can it now be defeated by her heir, who, as such, is liable to the performance of her obligations.

Pleaded for the Respondent :—When a wife’s estate is settled upon her husband and herself, in conjunct fee and liferent, the fee is held to be in the wife, and the husband takes only a liferent ; especially where the substitution, after the heirs of the marriage, is to the wife’s heirs of any other marriage, and also where the last substitution is to the wife’s heirs whatsoever.

2. Though neither the husband nor wife can

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gratuitously alter the provisions of a marriage contract to the prejudice of each other, or of the heirs of the marriage ; yet the heir of the marriage takes the succession in fee simple, and is under no obligation either to the other heirs of the marriage or to the other substitutes, and may dispose of it at pleasure. But,

3. William Blair, the son, had two titles, under either of which he could take up the estate, either under his grandfather's settlement or under the conveyance in the marriage contract; and having taken it up under the former, he had full power over it,—and, therefore, William Scott and his creditors can have no claim to it.

Judgment,
April 4, 1739.

After hearing counsel, “it is ordered and adjudged that the said petition and appeal be, and “is hereby dismissed this house, and that the interlocutors complained of be affirmed.”

For Appellants, *J. Browning, Al. Lockhart.*
For Respondent, *Ch. Areskine, R. Craigie.*

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BILLERS, &c.

v.

DUKE OF
NORFOLK,
&c.

SIR WILLIAM BILLERS, *et alii*, *Appellants* ;
THE DUKE OF NORFOLK, *et alii*, *Respondents*.

1st May, 1739.

INFERTMENT.—GENERAL BURDEN.—FRAUD.—LITIGIOUS.—

A disposition to a creditor, and infertment thereon, set aside, having been granted during the currency of a term, which the debtors had taken to produce a progress in an action of adjudication which had been raised against them at the instance of another creditor.

[Elchies, *voce* Adjudication, No. 21 ; *voce* Service and Confirmation, No. 8.]

THE respondents, who were lessees of certain No. 50.
lead mines in Argyleshire, granted a sub-lease thereof (January 1730,) to the York Building Company for the term of twenty-five years, at the rent of L.3600 a year, and the company bound themselves to infert the respondents on their estates in security of the rent.

In 1731, it became necessary for the company to borrow the sum of L.100,000, and in the proposals published for raising this sum by subscription, it was declared that the estates of the company should be made over to trustees, for behoof of the subscribers, when the sums should be advanced.

The sum of L.72,785 was then subscribed for, and the company directed their secretary to subscribe for the remaining L.27,215, for the behoof

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 &c.

of such persons as should afterwards agree to advance money upon the proposed security. This sum was afterwards subscribed for, and advanced to the company, who granted bonds of L.100 each to the amount of L.100,000.

In these circumstances, the respondents raised inhibition against the company, and, at the same time, executed a summons of adjudication against them; but before decree was obtained, the company took a term to produce a progress, with a view to a special adjudication which was then in use.

While this term was current, the company granted a disposition to the appellants (the trustees for the creditors who had advanced the money) of all their lands and estates within Scotland, with precept and procuratories, neither of which enumerated the lands; but the precept bore a general warrant to infest in all their lands in Scotland.

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Infestment was accordingly taken in all and singular the lands and tenements acquired by the company in Scotland,—and, in order to supply the defect, the notary, in extending the instrument of seisin, after reciting the act of the bailie in execution of the precept, proceeded to recite that to all the lands, &c. on which infestment had been taken, the company had right by infestments of such and such dates; but the infestments themselves were not produced or read by the bailie himself in giving infestment.

The company not having produced, as craved for by them, the term was circumduced, and decree of adjudication was pronounced, upon which the respondents obtained a charter from the crown, and were infest in the estates belonging to the

company ; and, in the same year, they were again infeft in virtue of the original obligation granted by the company in their favour in 1730.

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The respondents then instituted an action of reduction, improbation, and declarator,—on the ground that the conveyance in favour of the appellants was a fraudulent contrivance to invalidate their security, (having been granted after the sub-lessees had taken a term to produce in the action of adjudication at the respondents' instance,) and that the disposition, with the infeftments following thereon, being voluntarily granted in prejudice of the respondents, who were prior and lawful creditors, ought, therefore, in virtue of the act 1621, c. 18. to be set aside. The action was also founded upon the objection to the generality of the terms of the precept and infeftment.

The Court, (12th Jan. 1739,) upon the report of the Lord Ordinary, “ Sustain this reason of reduction, (viz.) That there is no enumeration of the lands, lordships, and baronies belonging to the said company in the precept of sasine in the said disposition, nor in the disposition itself, which was the only warrant produced and published for taking the said infeftments; and they also sustain this reason of reduction, That while the pursuers were in the course of obtaining an adjudication against the company, which was obstructed by the company taking a day or term to produce a progress, (which they did not do, but suffered the term to be circumduced,) the said company did, while that term was current, grant the disposition in question, in prejudice of the pursuer's diligence by adjudication, founded on anterior

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“ and lawful debts contracted by the company in
 “ the year 1730, by which the company was oblig-
 “ ed to infest the pursuers in an annualrent of
 “ L.3600 ; and find the same relevant to reduce the
 “ disposition aforesaid ; and they also find, that the
 “ company could not set up the sum of L.27,215,
 “ subscribed, in consequence of their order, by
 “ their secretary Henry Strachey, nor secure the
 “ same by infestments, to the prejudice of the pur-
 “ suers, their anterior and lawful creditors, &c. ;
 “ and they find the pursuers preferable to the
 “ mails and duties of the company’s estates, at
 “ least to the extent of L.3600 yearly, &c. and
 “ they reduce and decern accordingly.”

Entered
 Feb. 19, 1739.

The appeal was brought from this and several interlocutors of the 26th of July, 1737, and 7th of February, and 17th of November, 1738.

Judgment,
 May 1, 1739.

After hearing counsel, ‘ It is ordered and adjud-
 ‘ ged, &c. That so much of the several interlocu-
 ‘ tors complained of in the appeal, whereby the
 ‘ Court of Session sustained the reasons of reduc-
 ‘ tion following, viz. “ That while the said plain-
 ‘ tiffs were in the course of obtaining an adjudica-
 ‘ tion against the company, which was obstructed
 ‘ by the company’s taking a term to produce a pro-
 ‘ gress, which they did not do, but suffered the
 ‘ term to be circumduced, the said company did,
 ‘ while that term was current, grant the disposi-
 ‘ tion in question, in prejudice of the plaintiff’s di-
 ‘ ligence by adjudication, founded on an anterior
 ‘ and lawful debt, contracted by the company in
 ‘ the year 1730, by which the company was bound
 ‘ to infest the plaintiffs in an annualrent of L.3600
 ‘ sterling, and that the company could not set up
 ‘ the sum of L.27,215 sterling, subscribed in con-

“ sequence of their order by their secretary Henry Strachey, nor secure the same by infeftment, to the prejudice of the plaintiffs, their anterior and lawful creditors,” and also so much of the several interlocutors, whereby the said Court of Session found, “ That the plaintiffs were preferable to the mails and duties of the company’s estates of Marischall, Southesk, and Linlithgow, at least to the extent of L.8600 sterling yearly, being the annualrent in which the company was obliged to infest the plaintiffs, in virtue of the contract in the year 1730 aforesaid, until the company’s rights to these estates shall be completed by infeftment therein, reserving to themselves then to consider whether the plaintiffs’ preference shall continue after such infeftment shall be taken or not ;” and also so much of the said interlocutors, whereby the Court of Session hath reduced, decerned, and declared accordingly, be affirmed ; and as to the other reasons of reduction mentioned in any of the said interlocutors, and sustained by the said Court of Session, it is hereby declared, That the said last mentioned reasons of reduction were not necessary to be advised, or determined in this cause ; and therefore it is hereby further ordered and adjudged, That so much of the said several interlocutors as relates to the said last mentioned reasons of reduction, be reversed, without prejudice to any of those points, when the same shall become necessary to be determined.’

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&c.

For Appellants, *Ch. Areskine, A. Hume Campbell.*

For Respondents, *James Erskine, W. Murray.*

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v.

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SIR JOHN HOME of Renton, - *Appellant* ;
 SIR JOHN HOME of Manderston, - *Respondent*.

23d May 1739.

WADSET.—RIGHT IN SECURITY.—Circumstances in which the right of reversion in a security of the nature of a wadset was found not to have expired by the mere lapse of time, although it had been declared in the agreement that the right of reversion “should cease on the running thereof.”

- No. 51. SIR JOHN HOME of Manderston, and the late Sir Robert Home of Renton, entered into a submission with regard to certain debts due by Sir Robert to Sir John, and affecting the estate of Renton. The arbiters found, *inter alia*, “that a considerable sum “of money was still due by Sir Robert to Sir John, “for payment whereof, and in lieu of whatever “claims Sir John had upon the estate of Renton “in any manner of way, they declared that Sir “John had right, and was entitled to” certain lands, mentioned in the award, and decerned Sir Robert and his heirs “to grant a valid disposition “to Sir John and his heirs,” and that under the following reversion, viz. “that upon payment of “90,000 merks Scots to Sir John or his heirs, by “Sir Robert or his heirs, or consignation thereof “in the hands of the treasurer of the city of Edinburgh for the time being, upon the premunition “of sixty days preceding any term of Whitsunday “or Martinmas, within ten years from and after “the date of the said award, Sir John and his

“ heirs should be bound and obliged to denude
 “ themselves of, and retrocess Sir Robert and his
 “ heirs to the said lands. Declaring that Sir John
 “ should not be accountable for the rents of the
 “ said lands during his possession and before re-
 “ demption, and that the said ten years should ex-
 “ pire, and the right of redemption cease on the
 “ running thereof, notwithstanding any super-
 “ vening minority of the heirs of Sir Robert ; and
 “ that the said Sir John’s entry to, and possession
 “ of the said lands, should begin at Whitsunday
 “ then next for the year 1726. And until the
 “ said disposition, under the reversion above men-
 “ tioned, should be granted and perfected by Sir
 “ Robert or his heirs, they decerned and ordained
 “ the apprisings, adjudications, dispositions, and
 “ other rights in the person of Sir John, to subsist
 “ and remain with him, as a security to him of the
 “ said lands, and of the said sum of 90,000 merks,
 “ for which the same are redeemable as aforesaid.”
 Sir Robert died soon after the date of this decree, and
 without having executed a disposition in terms of
 it. His eldest son, Sir Alexander, a minor, was
 served heir to him, and thereafter did, with con-
 sent of his guardians, give notice to Sir John, in
 terms of the award, to receive at the ensuing term
 of Whitsunday the aforesaid sum of 90,000 merks.
 At that term, however, the guardians insisted that
 it was not safe for them to pay the money, as they
 alleged that Sir John’s estate was encumbered with
 debt, and that a variety of real diligence had been
 led against it. They, therefore, offered a bond in-
 stead of the money, but this was refused.

They then brought an action of declarator, to

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have it found that the aforesaid clause of redemption was sufficient to entitle Sir Alexander to redeem the lands.

Pending this suit, Sir Alexander died in minority. His brother, (the appellant,) also a minor, being served heir to him, did, with the consent of his guardians, revive the action, and prayed that he might be allowed to amend the libel, by adding the following conclusion: "That upon paying the money in-
 "to the Court of Session the lands might be found
 "redeemed, and the defender ordained to clear
 "the lands of the incumbrances which he had
 "made thereon, and to convey to the pursuer
 "in terms of the award."

It was objected, however, that the ten years had expired since the date of the decree, and that the clause of redemption was therefore void, and the Lord Ordinary, (11th February, 1738,) "Found
 "the order of redemption void, and found the pur-
 "suer could not amend his libel by adding the
 "conclusion above-mentioned, the ten years with-
 "in which the lands were redeemable being elapsed, and assoilzied, leaving it to the pursuer to
 "insist in any other process as accords of law."

His Lordship afterwards "adhered, reserving to
 "the pursuer, when a proper order of redemption
 "was used, and declarator brought, to insist upon
 "any reasons competent of the law, why his re-
 "demption is not excluded by the lapse of ten
 "years."

The Court adhered.

Sir John (the appellant) and his guardians then raised a new action, setting forth that he had been disabled from performing his part of the award, as the lands stood encumbered with the respondent's

debts, and praying to have it found that he was entitled to redeem the lands, notwithstanding the lapse of the ten years, upon payment of the 90,000 merks into the Court of Session, subject to the direction of the Court.

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On the report of the Lord Ordinary, the Court (2d February, 1739) 'found that there was no place now for this declarator, and therefore as-
'soilzied.'

The appeal was brought from this interlocutor.

Entered

Feb. 22, 1738.

Pleaded for the Appellant:—A security of the nature of that which was given to the respondent is both in equity and by the law of Scotland redeemable, notwithstanding the specified term has elapsed, until a decree is obtained in an action of declarator that the term of redemption is expired.

In the circumstances of the case, the respondent's estate being encumbered with debts and real diligence, it would have been unsafe for the minor or his guardians to have paid the money, as it was not in the power of the respondent to grant a renunciation. It was thus in consequence of circumstances imputable to him, that the redemption was not made, and it would be against all equity to allow him to take such an advantage of the minor under colour of non-performance, when, in fact, the non-performance was owing to his own situation.

Pleaded for the Respondent:—By the decree pronounced in the former action, reserving liberty to the appellant "to insist upon reasons competent of the law why his redemption is not excluded by the lapse of ten years," the right of redemption is made to depend upon his using a proper order of redemption, and as no such order has been

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made, the point now insisted on by the appellant is *res judicata*.

The case of the respondent is different from that of a common wadsetter, and entitles him to insist upon the strict performance of every form which was made incumbent on the debtor.

If the redemption money had been paid up or consigned, there would have been no difficulty in granting the renunciation, because the respondent would thereby have been enabled to pay all his debts, and to have cleared his estates from the diligences which affected them.

Judgment,
May 23, 1739.

After hearing counsel, "It is ordered and adjudged that the interlocutor complained of in the said appeal be, and the same is hereby reversed; and it is hereby declared that, upon the particular circumstances of this case, the appellant is entitled to redeem the lands in question; and it is further ordered, that the said Lords of Session do give such directions, touching the said redemption and the terms thereof, and the conveyance of the said estate, as shall be agreeable to justice and equity."

For Appellant, *Ch. Areskine, W. Murray, A. Hume Campbell.*

For Respondent, *John Browning, Ch. Gordon.*

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FULLERTON

v.

KINLOCH.

WILLIAM FULLERTON, *et alii*, *Appellants* ;
DAVID KINLOCH, *Respondent*.

13th Feb. 1740.

FOREIGN.—SUCCESSION.—HEIR AND EXECUTOR.—A simple contract debt incurred in England, though in that country not affecting the heir of the debtor, may be the ground of affecting his landed estate in Scotland.

COSTS.—L.100 given to respondent.

[Clerk Home, No. 125. Elchies *voce* Succession, No. 6. Fol. Dict. I. p. 319. Mor. Dict. p. 4456. Brown's Supp. V. p. 670.]

William Fullerton, a Scotsman by birth, died No. 52. domiciled in London, after having contracted debts there, consisting principally of the contents of a promissory note for L.100, and some debts on account. These debts were assigned to the respondent, Mr. Kinloch, who brought an action against Fullerton's children for payment, and charged the eldest son, (the appellant,) to enter heir to his father, to an heritable bond in Scotland for L.4000.

The heir, *inter alia*, pleaded, that the debts were contracted in England, where simple contract debts do not affect the heir or heritage, unless expressly mentioned, but only the executor and personal estate; and, therefore, that they could not affect the heir or estate in Scotland, for that the question must be decided by the *lex loci contractus*.

Answered.—It is of no importance what may

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be the law of England, for it is the law of Scotland, which must be the rule. By this law, all debts, wherever contracted, may, by the diligence of the law, be made to affect both the real and personal estate, the heirs having relief according to the nature of the several debts and estates. And by the known maxims of law, not only succession to lands, but competitions between rights and incumbrances upon lands, are to be determined *secundum legem loci*, where the subject is situated, this being the only rule in the Court, from which decrees concerning such real estate can receive execution.

The Lord Ordinary (Elchies) repelled the defence, and sustained the claim of the respondent, (Dec. 8, 1738,) and the Court adhered, (July 1739.)

The appeal was brought from these interlocutors.

Entered
 Nov. 23,
 1739.
 Judgment,
 Feb. 13, 1740.

After hearing counsel, "It is ordered and adjudged that the interlocutor complained of be affirmed, and that the appellants do pay to the respondent the sum of L.100 for costs in respect of the said appeal."

For Appellants, *W. Noel, J. Erskine.*

For Respondent, *Ch. Areskine, W. Murray.*

1740.

SIR JAMES CUNNINGHAM, of Milne- } *Appellant*;
 craig, }
 Captain JOHN CHALMER of Gadgirth, } *Respondents*.
 and the EARLS of LOUDON, and }
 STAIR, and COLONEL DALRYMPLE, }

CUNNINGHAM
 v.
 CHALMER,
 &c.

24th March, 1740.

PROOF—A proof taken in virtue of a diligence from the Court of Session, in the course of a submission, which came to an end without any decret-arbitral being pronounced, admitted in the particular circumstances of the case, in a subsequent litigation between the same parties, the power of re-examining the witnesses being reserved.

PROCESS.—APPEAL.—The Court of Session having (by an interlocutor not appealed from) refused to make certain persons parties to a depending action,—it was found to be incompetent to call them as parties in the House of Lords, in an appeal from the final judgment in the action.

[*Elchies voce Proof*, No. 1. Fol. Dict. II. p. 349. Mor. Dict. p. 14044.]

The appellant and Captain Chalmer, (one of the No. 53. respondents,) having submitted certain points in dispute between them to arbitration, it became necessary to examine witnesses in the cause; but as the arbiters had no authority to compel the appearance of witnesses, the Court of Session, upon application being made to them, made an order for witnesses to attend, and be examined upon oath before the sheriff of Ayrshire. Several witnesses were accordingly brought forward by the respondent, and examined by the sheriff, and their depositions taken down in writing; but the arbiters, not being agreed in opinion, did not pro-

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nounce any award within the time limited by the deed of submission, and the case having come again before the Court of Session, the respondent presented a petition, praying that these depositions might be admitted as evidence. Upon advising this petition with answers, the Court, (Jan. 20, 1733,) ‘in respect it was not alleged that any of the witnesses examined before the arbiters were dead, or out of the country, refused the desire of the petition.’

But upon advising a second petition with answers, their Lordships found, (Nov. 27, 1733,) “That the probation taken before the arbiters ought to be admitted as evidence, so far as the same is habile, and concluding upon the matter of it.”

And by another interlocutor, (Dec. 15, 1733,) they “adhered to their former interlocutor, with this explication, viz. That as to living witnesses, they may be examined at the desire of either party.”

A petition praying the Court to find,—that the testimonies of such of the witnesses then living, as the appellant shall think fit to repudiate, are not to be sustained as evidence—was refused without answers.

Entered
Nov. 16, 1739.

The appeal was brought from these interlocutors of the 27th Nov. and 15th Dec. 1733, and others in the cause.

Pleaded for the Appellant:—The authority of arbiters is founded only upon the consent of parties, which implies this condition, that an award must be pronounced on the matters in dispute, and can have no operation if such award do not follow; and in the present case, as the arbiters did not give any award, their authority ceased, and the

parties could not be bound by the examinations taken by them. Arbiters, moreover, are not bound by the ordinary rules of law, and often examine witnesses, who would not be admitted in a court of law, reserving to themselves to consider what credit ought to be given to such testimony.

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&c.

When it is intended that the evidence taken before arbiters should be afterwards received in a court of judicature, express provision is made for this in the bond of submission, which shows that the ordinary rule is against the admission of such evidence.

The evidence can never be said to be the best of its kind that could be had, when the witnesses, who were alive, were not re-examined in Court.

[No argument on this point appears for the respondent in his appeal case.]

After hearing counsel upon this point, 'It is declared, that the said proof taken under the submission to arbiters, having been in some degree authorized by the Court, by granting diligence for summoning the witnesses to be examined before the sheriff of Ayr, and the appellant having acquiesced so long under the interlocutors touching this point, the said interlocutors, so far as they relate thereto, ought to be affirmed; and it is therefore ordered and adjudged that the same be affirmed.'

Judgment,
March 25,
1740.

In the course of the proceedings in the Court of Session, application was made by Sir James Cunningham, to have the Earls of Stair and Loudon, and Colonel Dalrymple made parties to the action at his instance, although they had not been summoned originally; and the Court (February 24, 1732) ad-

1740. CUNNINGHAM v. CHALMER, &c. mitted "them to be parties to the cause, and allowed them to be heard for their interests," but upon advising a reclaiming petition for Captain Chalmer with answers, they "refused to admit them as parties in the cause." (8th June.)

This interlocutor was not appealed from. But Sir James afterwards endeavoured to make them parties in the House of Lords, by serving them with the order for giving in answers, and insisted that they ought to have been made parties by the Court of Session. It was objected, that as they had not been made parties in the Court of Session, which had even refused to hold them as such, whatever was done in that Court must be held as to them, *res inter alios acta*. The appeal could not be carried beyond the cause appealed, neither was it the custom of the House of Lords to hear and decide upon the rights of persons, who had not been heard on the merits of the case in the courts below.

Judgment,
March 24,
1740.

After hearing counsel, "It is ordered, that the said appeal as to the said Earls of Loudon and Stair, and Colonel Dalrymple, be and is hereby dismissed."

For Sir James Cunningham, *Ch. Erskine, Al. Lockart*.

For Captain Chalmer, *W. Noel, W. Murray*.

For the Earls of Loudon and Stair, and Colonel Dalrymple, *Js. Erskine*.

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EARL OF SEL-
KIRK
v.
DUKE OF
HAMILTON.

JOHN, Earl of SELKIRK, - - - *Appellant*;
JAMES, Duke of HAMILTON and }
BRANDON, - - - - - } *Respondent.*
et e contra.

3d April 1740.

SUCCESSION.—HERITAGE.—CONQUEST.—What held to fall under conquest.

[Elchies, *voce* Heritage and Conquest, No. 3.—Brown's Supp. V. p. 684.]

WILLIAM, Duke of HAMILTON, had issue by Anne No. 54. his duchess—James, (afterwards Duke); Charles, created Earl of Selkirk; John, his third son, and several other children.

Charles, Earl of Selkirk, died in March 1739 leaving considerable heritable property. His moveable estate was carried by his last will and testament. The heritable property was of various kinds. It embraced,

1. Lands which he had purchased, taken to himself, and his heirs and assignees whatsoever. In some of these lands he had been infeft, in others not.
2. Adjudications, (with the same destination) in which he was not infeft.
3. Heritable bonds, on which infeftment had followed.
4. Heritable bonds, on which infeftment had not followed.

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5. Bonds secluding executors.

6. Bonds of corroboration (secluding executors) of two kinds. 1st, Bonds corroborating the debts contained in the heritable bonds and accumulating the arrears of interest into principal sums ; and, 2dly, Bonds corroborating the debts contained in the moveable bonds, and accumulating the arrears contained in these into principal sums.

7. Lands conveyed in trust for the said Earl, upon which infestment had followed in the name of the trustee ; and heritable bonds also in trust, and in which the trustee had likewise been infest in his own name.

8. The superiorities of the lands of Balgray and Mosscastle. The property of these lands had been contained in an entail made by Duke William and his Duchess, in favour of the Earl, and the heirs male of his body, whom failing, to John the entail-er's third son. This deed contained a power of revocation, and had not been delivered. The Earl had purchased the property of these lands from the vassal and subvassals, and obtained procuratories for resigning them to himself, *ad perpetuam remanentiam*. The procuratory for resigning Balgray was not executed, but that for resigning Mosscastle was executed.

9. The teinds of the lands of Crawford Lyndsay, of which he had obtained a grant from the crown to himself, and his heirs and assignees whatsoever, and in which he was infest. The lands themselves had been contained in the entail of Duke William above referred to.

Upon the death of Earl Charles, a competition arose between his younger brother, John, then Earl of Selkirk, (the appellant) and his nephew, James,

Duke of Hamilton, (the respondent) son and representative of his elder brother. The former was served and retoured *heir male general of line* to the said Earl. The latter was served and retoured *general heir of conquest*.

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The Lord Ordinary (Elchies) pronounced an interlocutor, (July 27, 1739,) containing substantially the following findings.

‘ 1. That the lands, which the late Earl had purchased and in which he had been infeft, devolved to the Duke of Hamilton, as heir of conquest.

‘ 2. That the Duke as heir of conquest had also right to the dispositions and adjudications of lands acquired by the deceased, although infeftment had not followed on them.

‘ 3. That he had right to the heritable bonds acquired by the deceased, upon which infeftment had followed.

‘ 4. That he had also right to those which contained a clause of infeftment, although infeftment had not followed.

‘ 5. That the right of succession to the bonds secluding executors, and which contained no clause of infeftment, descended to the Earl of Selkirk, as heir of line.

‘ 6. That the bonds of corroboration (secluding executors) did not alter the right of succession to the original bonds as to the principal sums, and that therefore those corroborating the debts contained in the heritable bonds, devolved to the Duke, as heir of conquest, but that the bonds accumulating the arrears due on these into principal sums, and also those corroborating the debts contained in the moveable bonds, descended to the Earl of Selkirk, as heir of line.

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‘ 7. That the succession to the lands and heritable bonds conveyed in trust fell to the Duke, as heir of conquest.

‘ 8. That the right of succession to the lands of Balgray, descended to the Earl of Selkirk, as heir of investiture of the superiority.

‘ 9. That the succession to Moss Castle devolved to the same heir.

‘ 10. That the right of succession to the teinds of the lands of Crawford Lyndsay descended to the Earl of Selkirk, as heir to the lands themselves.’

The Lords adhered, (10 January, 1740.)

Entered 15th
 January 1740.

An appeal was brought by the Earl of Selkirk from the 1st, 2d, 3d, 4th, and 7th findings above recited, and from that part of the 6th finding, which determines that the bonds of corroboration do not alter the right of succession to the original bonds, as to the principal sum therein contained, and that the same fall to the heir of conquest.

Entered 25th
 January 1740.

A cross appeal was brought by the Duke of Hamilton, from the 5th finding, from part of the 6th, and from the 8th, 9th, and 10th findings.

ON THE ORIGINAL APPEAL.

Pleaded for the Appellant.—As to the first finding,—heirs of conquest can only come in where no other provision is made for the succession. In the present case, they are cut out by the destination to the “ heirs whomsoever of the granter.”

As to the second finding,—where no infeftment has been taken, there is no room for the heir of conquest. By the 88th chapter of *Quoniam attachiamenta*, by which the law of conquest was introduced, he is only entitled to lands in which the ancestor died seized.

As to the third finding,—heritable bonds cannot be assimilated to lands or tenements, even where infeftment has followed on them: neither, *a fortiari*, can they be so assimilated where there has been no infeftment. In this case they are mere personal securities for money lent. The cases referred to do not apply, there having been there no destination to heirs whatsoever.

As to the 7th finding, with regard to the lands and heritable bonds which were vested in the person of trustees,—there was a bare right of action against the trustees in the Earl of Selkirk; and this cannot in any shape be considered as conquest.

As to that part of the 6th finding, which determines that the bonds of corroboration do not alter the right of succession to the original bond,—it was argued, 1st, that the terms of these bonds of corroboration, being the last destination, must regulate the succession, and, therefore, although the original bonds might go to the heir of conquest, the latter bonds (secluding executors) must go to the heir of line, and, as they include the heritable bonds, they must also regulate the succession of these; and, 2dly, that the same words cannot in the same destination imply two different meanings, which would be the case here, if the destination were to carry the arrears of interest, and the principal sums contained in the moveable bonds to the heir of line, and the principal sums of the heritable bonds to the heir of conquest. It was clearly intended to give the former to the heir of line, and the same intention is to be presumed with regard to the latter. 3dly, The words, “without prejudice to the

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former bonds," (which had been used) are words of common style, and are only employed to prevent the former security from being impaired.

Pleaded for the Respondent:—As to the first finding,—there is nothing more certain in the law of Scotland, than that lands purchased by a person in which he has died infest, and which contain no particular destination, devolve to the heir of conquest.

The 2d, 3d, and 4th findings, proceed upon the same principles. By the law of Scotland, the elder brother, as heir of conquest, succeeds to his immediate younger brother in all real and heritable estate which the younger brother has acquired or purchased—not only in lands, but in all such other rights, whereupon infestment has followed or may follow. This is the opinion of Craig, Hope, Stair, Mackenzie, and others, and there are various decisions to the same effect, *Robertson v. Lord Halkertoun*, 7th July 1675, (Mor. 5605) A. v. B. 21st July 1676, (5608) A. v. B. 29th Feb. 1677, (5608) *Andersons*, 28th June 1677, (5609) *Creditors of Menzies*, 8th Dec. 1738, (5614.)

It is a mistake to say that this distinction between heirs of line and heirs of conquest was introduced by *Quon. attach.* It was introduced by custom, and not by statute; and indeed it is so stated in a former part of that work; but the book itself was never considered as authentic, or entitled to legal authority. It was never received as a collection of Scots statutes, and has only been regarded as containing notices of some ancient customs.

There are a variety of instances where the briefs issuing out of the chancery of Scotland, direct the Sheriffs or Bailies to serve the persons

heirs of conquest in general, and they are so re-
toured. This shows that the heir of conquest is
entitled to heritable rights on which infeftment has
not followed.

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With regard to the lands and heritable bonds
conveyed in trust,—the beneficial interest in these
must go to the same person to whom the lands, if
directly conveyed, would have gone. Had the
Earl taken these rights in his own name, they must
have gone to the Duke as heir of conquest, and
taking them in the name of trustees does not alter
the nature of the estate; and as the estate goes to
the heir of conquest, he, and he only, is entitled
to bring an action to have them conveyed to him.

With regard to that part of the 6th finding which
determines that the bonds of corroboration do not
alter the nature of the original heritable bond,—al-
though the late Earl thought fit to take a new
bond for payment of all the money due, this by no
means altered the nature of the original bonds,
which are heritable, and contain clauses of infeft-
ment, and undoubtedly go to the heir of conquest.
The only design of taking such new bonds was to
convert the interest into a principal sum. The
bonds accordingly bear to be ‘ without *prejudice*
‘ or *innovation* of the former securities,’ and it
would therefore be contrary to the express words, as
well as to the plain intention of the parties, to make
these bonds alter the succession of the original he-
ritable bonds.

ON THE CROSS APPEAL.

*Pleaded for the Appellant, (the Duke of Hamil-
ton):*—As to the last part of the sixth finding,—as

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the bonds secluding executors, were purchased by the late Earl, and are made heritable by *statute*, they ought to go to the proper heir in acquired heritable rights, the heir of conquest. The bonds of corroboration are also in the same way conquest and heritable, and moreover the sums in them are made accessory to the original capital sums, which have been found to devolve to the heir of conquest, and these ought also to have been found to devolve upon the same heir.

As to the objection that the heir of conquest is only entitled to lands and such heritable subjects, upon which infestment either has followed or may follow,—it is answered, that in the cases of heirship moveables, tacks, &c. which are either generally moveable, or not of a permanent nature, these have not been held to fall under conquest, being taken up without service; whereas in the case of bonds secluding executors—these being rendered heritable by statute—a service is necessary, in the same manner as in the case of bonds bearing a clause of infestment, and of consequence go likewise to the heir of conquest.

As to the 8th and 9th findings, with regard to the lands of Balgray and Moss Castle,—those being purchased by the late Earl, and the destination to them to his heirs and assignees, ought, as well as the other conquest estate, to descend to the heir of conquest.

The superiority, (the entailed estate,) and the property of those lands, were, by the feus and subfeus which had been made, completely separate estates. They were as much separated from the entailed estate as any other lands could be; and as such, the Earl took the rights to himself, his heirs,

and assignees, and not to the heirs of the entailed estate.—As to the property of the lands of Balgray, this was not united to the superiority at the time of the Earl's death, the procuratory of resignation not having been executed, and therefore must descend as a new purchase to the heir of conquest.

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EARL OF SEL-
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With regard to the property of Moss Castle, although resignation had followed, there is a difference between the case of the property returning to the superior by any feudal casualty, and the case of a voluntary agreement like the present, where the superior purchases back the feu. In the first case, the union is absolute, and the property (the subaltern right) must descend according to the destination of the superiority; but, in the other case, although the superior has united the property with the superiority, he retains the same power over his purchase as before the union, and having taken the purchase to his heirs and assignees, and not to the heir of the superiority, it must also descend to the heir of conquest.

With regard to the tithes of the entailed estates, similar arguments apply, viz. that as tithes of lands are, by the law, deemed a separate estate from the lands themselves, and carried by separate titles, and as the tithes in question were purchased by the late Earl, and taken to him and his heirs male whatsoever, and not to the heir of the entailed estate, they must descend to the heir of conquest.

Pleaded for the Respondent, (the Earl of Selkirk):—Bonds secluding executors, as they contain no obligation to infest, are only heritable by the destination of the proprietor: the succession to them is well known and ascertained in the law

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of Scotland, and they cannot, in any shape, fall under the denomination of conquest.

As to the last part of the sixth finding,—if no bond of corroboration had been taken, the arrears of interest would, without doubt, have gone to the executors; and it appears absurd to say, that they are made descendible to the heirs of conquest, by being included in a bond which has always been held as descendible to the heir of line.

As to the fifth and ninth finding,—it was clearly the Earl's intention to consolidate the property with the superiority; and, in the case of Balgray, this was formally done. The procuratories of resignation are not in the usual form, but are taken in such terms that the lands should remain with, and be merged in the superiority, and of consequence descend to the heirs of the superiority.

As to the tenth finding,—the estate of Crawford Lyndsay being limited by settlement to the heirs male of the late Earl, whereby it was admitted that the present Earl must inherit the same; and the teinds being in like manner limited to the late Earl's heirs male, it must be the same heir male who succeeds to both.

Judgment,
 2d April,
 1740.

After hearing counsel, “it is ordered and adjudged, that the several interlocutors complained of be affirmed.”

For Appellants, *Ch. Areskine, W. Murray.*

For Respondents, *W. Hamilton, Alex. Lockhart.*

1740.

LORD GARNOCK, &c.

v.

EARL OF GLASGOW, &c.

GEORGE, VISCOUNT GARNOCK, *et alii*, *Appellants* ;
EARL OF GLASGOW, *et alii*, - - *Respondents*.

18th April, 1740.

TAILZIE,—ACT 1685, c. 22.—The act 1685, respecting the registration of entails, applies as well to entails made prior, as to those made subsequent to its date.

The fetters of an unregistered entail not having been inserted in the rights and infeftments of an heir, although referred to generally, are ineffectual against the creditors of the heir.

[*Elchies voce Tailzie*, No. 7.]

THIS case arose out of the reservation contained in No. 55. the judgment of the House of Lords, in the question between John, Master of Garnock, and his tutor, and Patrick, Viscount of Garnock, and his creditors. (No. 34, *supra*.)

Viscount Patrick, (the respondent in the former case,) possessed the estate until his death, without inserting in his titles the fetters of the entail, and was succeeded by his eldest son, Viscount John, who made up titles to the estate, without serving heir to his father.

The creditors both of Viscount Patrick and of his father, then brought an action of declarator against Viscount John, and the other heirs of entail, to have it found that the entail was not effectual against them. The defences were the same as those pleaded in the former action.

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NOCK, &c.
v.
EARL OF
GLASGOW, &c.

The Lord Ordinary, (10th February, 1736,) repelled the defences, “ and sustained the declaration, at the instance of those creditors whose debts were contracted after the date of the act 1685, by the heirs whose retours and infeftments did not expressly contain the prohibitory, irritant, and resolute clauses contained in the entail.” And the Court adhered, (July 15, 1736.)

Entered
Feb. 6, 1739.

Upon the death of Viscount John, an appeal was brought by his brother, Viscount George, and his tutors, from these interlocutors of the 10th of February, and 15th of July, 1736.

Pleaded for the Appellants:—1. As the infeftments of Viscount John and Viscount Patrick contained a general reference to the fetters of the entail, this ought to be as effectual as the actual *verbatim* insertion of them, because third parties were thereby sufficiently informed of their existence, and ought to have been upon their guard.

2. The act 1685 could only have been intended to regulate entails made subsequent to the date of it: for there are no directions contained in it relative to entails which were in existence at the time.

Pleaded for the Respondents:—1. The words of the act are express, and apply to all entails whatsoever, viz. That the omission of the necessary clauses in the rights of the succeeding heirs shall import a contravention against the heir so omitting, “ but shall not militate against creditors and singular successors contracting *bona fide* with such heir.”

2. If there were any doubt whether the act 1685 had a retrospective effect, it would be cleared up

by the act 1690, c. 33, which enacts, "that no
 "heirs of entail, in infeftments, or other deeds
 "affected with prohibitory, irritant, and resolute
 "clauses, in case of contravention of the provision,
 "shall be prejudged by the forfeiture of his pre-
 "decessor, *providing the right of tailzie be regis-
 "trate, conform to the act of Parliament 1685.*" As
 this statute applies generally to all entails, whether
 prior or subsequent to the act 1685, and yet does
 not protect those which are not registered accord-
 ing to that act, it shows that all entails, without re-
 gard to their being made prior or subsequent to
 the act, must be registered conformably to it.

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 LORD GAR-
 NOCK, &c.
 v.
 EARL OF
 GLASGOW, &c.

After hearing counsel, "it is ordered and ad-
 "judged, &c. that the said petition and appeal be,
 "and is hereby dismissed this House, and that the
 "said interlocutor of the Lord Ordinary, and the
 "said adherence thereto by the Lords of Session
 "be, and the same are hereby affirmed."

Judgment,
 Apr. 18, 1740.

For Appellants, *Ch. Areskine, W. Hamilton.*

For Respondents, *Alex. Lockhart, W. Murray.*

1740.

LORD
ARBUTHNOT
v.
SPOTTISWOOD.

JOHN, LORD VISCOUNT of ARBUTH-
NOT and OTHERS, Creditors of } *Appellants*;
WILLIAM MORISON, late of }
Prestongrange, Esq. deceased,
JOHN SPOTTISWOOD of Spottiswood, *Respondent*.

22d April, 1740.

RES JUDICATA.—An extracted judgment of the Court of Session in favour of a pursuer not held to be *res judicata*, on the ground of its having been obtained by collusion on the part of the defender.

No. 56.

HENRY MORISON conveyed, by an *ex facie* absolute assignation, certain bonds and securities to the late Sir Alexander Morison of Prestongrange. Of the same date, Sir Alexander granted a back-bond, declaring that the object of the assignation was to relieve him from an obligation he had entered into jointly with Henry Morison for the payment of certain annuities, and he bound himself, upon the death of the annuitant, or upon being freed from the obligation, to pay back the sums contained in the bonds assigned.

It was provided in a marginal note, that in case Henry Morison had no heirs of his own body, the said settlement should operate only to secure payment to Henry Morison, or his assignees, of one half of the sums so assigned. This note was signed by Sir A. Morison, but it was not attested, nor did it mention the writer's name or designation, nor was reference made, in the body of the deed, to this addition.

Henry Morison had no heirs of his body ; but he conveyed to John Spottiswood in March 1701, (the father of the respondent,) all his estates, both real and personal, and *inter alia*, the back-bond above-mentioned. After Henry Morison's death, his assignee, John Spottiswood, (July 1701,) raised an action against William Morison, the son of Sir Alexander Morison, for payment of the above sums, with interest. The libel, however, was restricted *pro loco et tempore*, to the sum of 10,000 merks ; the pursuer admitting that one half did belong to the said William Morison.

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In defence, William Morison pleaded that his father had made regular payments of the annuities, many of the vouchers of which he alleged were in his possession ; and that, in virtue of the back-bond, the half of the sums belonging to him was intended to be free of all deductions.

John Spottiswood then insisted that the condition in the back-bond, not being contained in the body of the deed, but added in a marginal note, which was defective in the statutory solemnities, was therefore null and void ; and he claimed the whole sums contained in the libel. Considerable delay took place, and the first decision upon the effect of the marginal note was not pronounced till the year 1719, when the Lord Ordinary found (25th November,) ' that the marginal note in the ' back-bond not being signed by the witnesses, it ' cannot be probative.' William Morison reclaimed, and pleaded that, as it had been produced by the pursuer himself, he could not be allowed to claim under the deed, and reject the condition.

The Lord Ordinary adhered, (January 26, 1720.) and sustained the nullity of the note ; but super-

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seded giving judgment upon the other point,—how far the pursuer could be allowed to make that objection, in regard the back-bond had been produced by himself.

In 1724, the case having come before another Lord Ordinary, a decree *in absence* was pronounced for the whole sums contained in the libel.

William Morison represented, and answers were given in, and the case having been called in Court, and the defender's counsel having declined to debate, the Lord Ordinary adhered, and the decree was extracted.

Thereafter, Mr. Spottiswood obtained a decree of adjudication in absence, and he afterwards assigned these decrees, and the sums contained in them, to his son John Spottiswood, (the respondent.) William Morison having become bankrupt, other decrees of adjudication were obtained by creditors, among whom were the appellants, who instituted an action of ranking and sale of the debtor's estate. In this process all the creditors appeared.

The respondent produced his decrees of constitution and adjudication, and insisted for the whole sums contained in the bond.

The other creditors (the appellants) objected to the decrees, as obtained by collusion; and insisted, (*inter alia*,) upon the effect of the marginal note.

The respondent answered, 1st, that this marginal note was in itself null and void; and, 2dly, that the question with regard to its validity was *res judicata* by the interlocutor of the 26th January 1720.

The appellants replied, 1st, that the marginal note was evidently written by the same person

who wrote the body of the back-bond, and was signed by Sir A. Morison, and the witnesses to the deed must be presumed to have been witnesses also to the note. 2dly, That the respondent could not challenge the conditions contained in his own title; besides, his father had admitted the validity of the marginal note in the original process, and this admission could not now be retracted; and,

3dly, That there could be no *res judicata*, as the decree was pronounced in absence, and must have been obtained by collusion; the debtor's counsel having declined to debate.

The Lord Ordinary sustained the objection to the marginal note, (12th January 1734.)

Afterwards, upon advising a representation and answers, the Lord Ordinary reported the case to the Lords, who found, (23d November 1734,) 'that the question with respect to the marginal note was *res judicata*.'

Their Lordships afterwards adhered, (9th January 1735,) and the Lord Ordinary found, (28th November,) that the adjudication subsisted for the whole sums contained in the bond.

The appeal was brought from the interlocutors of the 12th January 1734, 23d November 1734, and 9th January, and 28th November 1735.

After hearing counsel, "it is declared that the question with respect to Sir A. Morison of Prestongrange's back-bond ought not to be deemed *res judicata*, by reason of certain circumstances of collusion appearing in some of the proceedings in the former case: and it is therefore, ordered and adjudged that the several interlocutors complained of be, and they are hereby re-

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ARBUTHNOT
v.
SPOTTISWOOD.

Entered
Feb. 19, 1739.

Judgment,
29th April,
1740.

1740. "versed; and it is further ordered, that the said
 LORD "Lords of Session are to proceed to determine
 ARBUTHNOT "touching the validity of the marginal note on
 " "the said back-bond, and the merits of this cause,
 SPOTTISWOOD. "in such a manner as shall be just."

For the Appellants, *Wm. Hamilton, Alexander Lockhart.*

For the Respondent, *Charles Areskine, W. Murray.*

When the case was afterwards brought before the Court of Session in consequence of the above judgment, their Lordships found, "that the marginal note was good against the user." (Kilk. p. 606, Brown's Supp. V. p. 709.)

PATRICK DAVIDSON of Woodmiln, *Appellant*;
 ALEXANDER WATSON of Glentarkie, *Respondent*.

4th December, 1740.

PREScription.—ACT 1579, c. 83.—Found that the act does not apply to actions for the aliment of minors.

[Clerk Home, No. 135; Kilkerran, p. 415; Mor. Dict. p. 11077; Brown's Supp. V. p. 200.]

No. 57. ALEXANDER WATSON of Glentarkie had issue by Jean, his wife, one daughter, Margaret. Failing her and the heirs of her body, he settled his estate upon Alexander Watson the respondent (second son of Watson of Aithernie,) and he appointed Aithernie tutor to his daughter.

Upon the death of Glentarkie, his widow intermarried with Patrick Davidson, and Margaret the infant lived in their family, and was alimanted by them till her death. She died in minority.

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v.
WATSON.

The succession to the landed estate then opened to the respondent; and Athernie, as his tutor in law, granted a bond in favour of Patrick Davidson for 4000 merks as the aliment due for Margaret Watson at Whitsunday 1724.

In 1730, Davidson assigned this bond to his son (the appellant,) and a bond of corroboration was granted in his favour by Athernie and the respondent, then a minor.

In 1735, the respondent being then of age, an action was raised against him for payment of these bonds, and he, on the other hand, instituted an action of reduction of them on the head of minority and lesion.

The Lord Ordinary (10th February 1737,) “re-
“pelled the reasons of reduction; the bond in-
“ferring no lesion, in respect it was granted for
“aliment of Margaret Watson whom the respond-
“ent represented.”

But the Court, upon advising a petition and answers, (6th December 1738,) altered this interlocutor, and ‘sustained the reasons of reduction, ‘and reduced the said bond, and bond of corroboration, and decerned, reserving to the appellant ‘to insist against the heir or executor of the minor ‘(Margaret Watson) for aliment and education as ‘accords.’

An action was then instituted against the respondent for aliment from 1715 to Whitsunday 1724. The defence was, that the debt being for

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aliment, was prescribed by the 6th of James VI. establishing the triennial prescription.

The appellant answered, that the debt did not fall under the particulars specified in the act of Parliament; the cases provided for being those of debts that are in use to be paid in ready money, which cannot be said of the aliment of minors.

The Lord Ordinary 'found (4th January 1739) 'the bond bearing to be granted on account of the 'cedents having alimented, and otherwise disbursed upon the education of the deceased Margaret 'Watson from Whitsunday 1715 to Whitsunday '1724; the assignation to the bond implies an assignation to all the claims competent to the cedent 'against the granter of the bond for the said aliment 'to the extent of the sum in the bond; and therefore, notwithstanding the bond is reduced by the 'respondent on the head of minority and lesion, 'sustained the pursuer's title, and repelled the 'defence of the triennial prescription, in respect 'of the reply, and found the defender liable, reserving to him to be heard on the modification 'of the sum due.' But the Court, upon advising a petition and answers, found (16th November 1739,) 'that the aliment of the minor did fall under the triennial prescription.*'

Entered
 Dec. 7, 1739.

The appeal was brought from the interlocutors of the 6th December 1738, and 16th November 1739.

*Pleaded for the Appellant:—*The aliment being admitted, Margaret Watson was debtor for the

* "It being thought unreasonable and contrary to the genius of the law that a minor should be less privileged than a major." Kilk. p. 415.

amount, and upon her death, both her heir and executor were liable, and the creditor might make his demand against either.

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WATSON.

The respondent, the heir, might have been compelled to pay; and therefore it was of advantage to him that the bond was granted, and he cannot now challenge it on the head of lesion.

The case does not fall under the triennial prescription. That is founded, in the cases specified, on the presumption of payment in ready money and without receipt, whereas the presumption is, that minors have no money to pay, and their tutors and curators never do pay without taking a receipt to serve as a voucher in settling their accounts with their ward.

Pleaded for the Respondent:—The respondent was lesed by the bond in question, because it debarred him from challenging Jean Watson's intrusions with the estate, which were more than sufficient to pay the aliment of Margaret, and because it cut off his right of relief against the executor, the proper heir in the debt.

The plea of prescription is supported by the words of the act, which apply to all aliments, without distinction, between the case of minors and that of majors; and indeed in matters of prescription, the former is more favoured than the latter.

After hearing counsel, "it is ordered and Judgment, "adjudged, that in the said interlocutor of the December 4, "6th December 1738, after the words, ('said 1740. "bond of corroboration,') these words be inserted " '(so far as the same do establish a certain li- "quidated debt of four thousand merks with "interest against the respondents;)' "and that "at the end of the said interlocutor, these

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“ words be added, (‘ and that the said bond, and
“ ‘ bond of corroboration do stand as securities in
“ ‘ what shall be found justly due for such aliment
“ ‘ and education ;’) and that the said interlocutor,
“ with these additions be, and the same is hereby
“ affirmed ; and it is farther ordered and adjudged,
“ that in the interlocutor of the Lord Ordinary, of
“ the 4th January 1739 after the words (‘ on the
“ ‘ head of minority and lesion,’) these words be
“ inserted, (‘ so far as the same establishes a cer-
“ ‘ tain liquidated debt of four thousand merks,
“ ‘ with interest against the respondent,’) and that
“ in the same interlocutor, instead of these words,
“ (‘ ‘ reserving to him to be heard,’) these words be
“ inserted, (‘ reserving to both parties to be heard ;’)
“ and at the end of the said interlocutor these
“ words be added, (‘ and reserving to the respond-
“ ‘ ent the benefit of any compensation or dis-
“ ‘ charge arising from any intromissions by Patrick
“ ‘ Davidson, the appellant’s father, or Jean Wat-
“ ‘ son his wife, with Margaret Watson the minor’s
“ ‘ effects,’) and that with this variation and these
“ additions, the said interlocutor be, and the same
“ is hereby affirmed. And it is further likewise
“ ordered and adjudged, that the said interlocutor
“ of the Lords of Session of the 16th November
“ 1739, in the said appeal complained of be, and
“ the same is hereby reversed.”

For Appellant, *W. Hamilton, W. Murray.*

For Respondent, *W. Noel, A. H. Campbell.*

1740.

ROBERTSON
v.
MARQUIS OF
ANNANDALE.

THOMAS ROBERTSON, - - - *Appellant*;
GEORGE MARQUIS of Annandale,
the EARL and COUNTESS of } *Respondents*.
Hopetoun, - - - }

10th December, 1749.

PRESCRIPTION.—ACT 1579, c. 83.—Circumstances under which a claim for servants' wages was found to be prescribed.

Found that that term of prescription is to be applied which is recognised by the law of the debtor's domicile, in opposition to that of the *locus contractus*.

THOMAS Robertson, (the appellant,) while in Eng. No. 58. land, entered into the service of James Marquis of Annandale (then Lord Johnston) in August 1717, as his Lordship was going upon his travels; and remained with him abroad until the year 1721. He then went down to Scotland with the Marquis, and remained with him till the year 1726, when he left his service, and went abroad.

It does not appear that there had been any agreement between the parties, as to the wages, or salary to be paid to the appellant; or that there had been any settlement of their mutual accounts. As to the capacity in which the appellant had been employed, he maintained that it was as a private secretary; and the respondents admitted that, although a domestic servant, he had kept his Lordship's accounts and received and laid out his money.

By a writing executed on the 14th November 1724, the Marquis desired, that at the first term

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 ANNANDALE.

after his death, half a year's wages more than what was due to them, should be paid to all his servants, and to the said Thomas Robertson 50 guineas, over and above. At the time that the appellant left his service, the Marquis also gave him a promissory note for 2000 merks.

The Marquis died in 1730, whereupon the appellant brought an action against the respondents, his executors, for payment, 1st, Of L.1780 as his salary, at the rate of L.200 a year. 2dly, Of the half-year's wages provided for by the writing of the 14th November 1724. 3dly, Of the 50 guineas contained in the same writing. And, 4thly, of the sum contained in the promissory note.

Marquis George as heir of entail, appeared, and was made a party to the action.

The Commissaries found, (9th November 1739,) " That the first claim for wages was prescribed by " the 6th of James VI. cap. 83. That the dona- " tion of a half-year's wages more than was due, " contained in the writing of 1724, could only " respect those servants who were in the service " of the Marquis at the time of his death ; and as " the pursuer had left his service some time be- " fore this event, he had no right to it. But they " sustained the legacy of 50 guineas, and also the " claim for the 2000 merks contained in the pro- " missory note."

Robertson presented a bill of advocacy, upon advising which with answers, the Lord Ordinary refused the bill, (19th December 1739,) and the Court adhered (3d January 1740.)

Entered

Jan. 25, 1740.

The appeal was brought from those parts of the interlocutor of the Commissaries, which found,

that the claim for wages was prescribed, and that the appellant had no right to the half-year's wages ; and also from the above interlocutors of the 19th December 1739, and 3d January 1740.

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 ROBERTSON
 v.
 MARQUIS OF
 ANNANDALE.

Pleaded for the Appellant :—The services being admitted, and payment not being alleged, it is reasonable (although the appellant cannot prove any particular agreement) that he should receive such remuneration as is usually given to persons acting in the situation in which he was placed. A settlement between the Marquis and appellant, during the life of the former, was prevented by various circumstances.

2. The act establishing the triennial prescription, cannot properly affect this case, being only intended for the meaner sort of servants, upon a presumption that they would not, and could not, subsist so long without their wages : but though this case were comprehended in the act, its operation is avoided by the writing in 1724 acknowledging that wages were then due.

3. The agreement between the late Marquis and the appellant was entered into in London, and must be governed by the laws of England, by which, actions of this nature are not barred within less than six years, whereas the present action was raised within four years after the service was ended.

Pleaded for the Respondents :—The act of Parliament makes no distinction between servants of a higher or lower denomination ; but enacts, “ that actions of debt, servant's fees, &c. not “ founded on written obligations, be pursued with- “ in three years, otherwise the creditors shall have

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 ANNANDALE.

“no action, except he prove by writ or by oath of
 “party.”

The writing in 1724 does not even imply that there were any wages due in 1726, nearly two years after the time when the appellant quitted the Marquis' service. The presumption is, and must be, that all the wages due to the appellant were paid, as he made no demand till after the Marquis' death.

Judgment,
 10th Decem-
 ber 1730.

After hearing counsel, “it is ordered and ad-
 “judged; &c. that the interlocutors complained of
 “be affirmed.”

For Appellant, *William Noel, William Ham-
 milton.*

For Respondents, *W. Murray.*

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PRINGLE

v.

PRINGLE.

THOMAS PRINGLE of Symington, - *Appellant* ;
 ALISON PRINGLE and HUSBAND, - *Respondents*.

21st January, 1741.

PROVISION TO CHILDREN.—A clause in a marriage contract, provided a certain sum to the children of the marriage, in satisfaction of all they could claim, except what the father should further provide to them of his own free-will,—found that the eldest son, by accepting a disposition of the landed estate from his father, is not deprived of his right to claim his share of this sum, as a child of the marriage.

[Clerk Home, No. 145. Kilk. p. 147. Elchies, No. 15, voce Mutual Contract. Brown's Supp. V. p. 698.]

IN the marriage contract of Robert Pringle and No. 59.
 Anne Rutherford, (father and mother to the parties to this appeal,) the said Robert bound himself, in case of his wife's predecease, to pay to the children of the marriage the following provisions :
 ' If there be only one son or daughter procreate
 ' of that said marriage, to content or pay to the
 ' said son or daughter the sum of 8000 merks, and
 ' if there be two or more children, to pay to them
 ' among them all the sum of 1200 merks money
 ' aforesaid, which sums of money provided to the
 ' child or children to be procreate in the said marriage in the cases above mentioned, are to be
 ' divided and proportioned among them by the

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‘ said Robert Pringle their father, as he shall think
‘ fit ; for which division, the said Robert Pringle,
‘ his declaration and appointment, at any time of
‘ his lifetime under his hand, shall be a sufficient
‘ warrant and rule ; and in case the said Robert
‘ Pringle their father shall not make the said divi-
‘ sion under his hand in his own time, then it shall
‘ be leasome and lawful to four of their friends and
‘ nearest of kin, two on the father’s side, and two
‘ on the mother’s side, to proportion and divide
‘ their provisions, as the said Robert Pringle their
‘ father might have done the same ; and which
‘ portions and provisions above provided to be
‘ divided as said is, the said Robert Pringle in the
‘ case aforesaid, binds and obliges him, his heirs,
‘ executors, and successors whatsoever, to pay to
‘ the said daughters to be procreate of the said mar-
‘ riage, at their full and perfect age of sixteen
‘ years compleat respectively, and to the son or
‘ sons to be procreate therein at their full and per-
‘ fect age of twenty-one years complete, or at the
‘ said daughters or sons their respective marriages,
‘ which of them shall first happen, together with
‘ the due and ordinary annualrent of the said pro-
‘ visions conform to the Act of Parliament, yearly,
‘ termly, and continually, during the not-payment
‘ thereof ; and which sums of money provided to
‘ the said children, one or more, to be procreate
‘ in the said marriage, is hereby declared to be in
‘ full contentation and satisfaction to them of all
‘ they can crave of the said Robert Pringle their
‘ father, except what further of his own proper
‘ will he shall provide to them, as also what shall
‘ accrue and belong to them as heirs and nearest
‘ of kin to the said Robert Pringle their father, in

' case he shall not have children in any other marriage.'

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The issue of this marriage were, Thomas Pringle, the appellant, two other sons, and one daughter, Alison Pringle, one of the respondents.

In June 1698, Robert Pringle executed a voluntary disposition of his landed estate in favour of the appellant, (then an infant,) reserving to himself full power to burden and affect it with debts, or to sell it, &c. in such manner as he should think proper. The disposition bears to have been made for the love and favour the father bore to his son, and for certain other onerous causes.

He likewise gave certain portions to his two younger sons, and took from them discharges of any claim they might have under the marriage contract. He made no declaration with regard to the division of the 12000 merks, nor did he execute the reserved powers with regard to the landed estate.

He died intestate in 1738, predeceasing his wife, and leaving personal property to the amount of 19000 merks. The appellant took possession of the estate, and the respondent, Alison Pringle, was confirmed executrix, and soon after was married to the other respondent, Macdowal.

The respondents then raised an action against the appellant before the commissaries for L.190, which was in the father's repositories at the time of his death. The appellant admitted the receipt of the sum, but pleaded compensation upon the ground of his right to a share of the 12000 merks provided in the marriage contract. The respondent insisted

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that the disposition of the landed property was a satisfaction of that demand.

The commissaries found, (10th Feb. 1739,) ‘ That the disposition of 1698 did not exclude the ‘ appellant from his share of the provisions stipulated in the marriage contract.’

But the Court, upon advising a bill of advocacy, which was reported by the Lord Ordinary, found, (14th December, 1739,) ‘ That the son ‘ having succeeded to his father by disposition to ‘ his land estate, his share of the 12000 merks was ‘ thereby extinguished.’

The Lord Ordinary therefore advocated the cause, and repelled the plea of compensation, (21st December;) and the Court adhered, (8th Feb. 1740.)

Entered
Feb. 26, 1740.

The appeal was brought from these interlocutors of the 14th and 21st December, 1739, and 8th February, 1740.

Pleaded for the Appellant :—It makes no difference to the appellant whether he be considered as having succeeded to the estate by disposition or by descent : for, 1st, The taking a land estate as heir, cannot be held as in satisfaction of any obligation the father came under to his heir, under the marriage contract.

2. A disposition, which the granter could alter at pleasure, could not have been intended as in satisfaction of a prior personal obligation.

3. Nothing was done by the father to show that such was his intention. If he had intended this, he would have taken a discharge as he did in the case of his two younger sons.

4. The provisions, moreover, are declared to be

in full satisfaction of what the children can crave from their father, except what further he should provide to them of his own free will, or what should belong to them as his heirs or nearest of kin.

Pleaded for the Respondent:—It could not have been intended that the eldest son should have a double portion, (the real estate being of much greater value than 12000 merks,) and yet come in for a share of this sum. So far was the father from intending this, that, in the disposition of 1698, he had it in view, that he might throw some part of the provisions for the younger children upon the real estate.

After hearing counsel, it is ordered and adjudged, ' That so much of the interlocutor of the 21st ' December, 1739, whereby the Lord Ordinary did ' advocate the cause be, and the same is, hereby ' affirmed; but that the residue of the said interlocutor, as also the interlocutor of the Lords of ' Session of the 14th December, 1739, and other ' interlocutors adhering thereto of the same month ' be, and the same is hereby reversed; and it is hereby declared and adjudged, that the disposition ' granted by the appellant's father of his land estate ' to the appellant, does not exclude him from his ' share of the provisions stipulated by his father in ' his contract of marriage to the children of the ' marriage: and therefore, it is hereby ordered and ' adjudged, that the appellant do claim so much ' thereof as will compensate his share of the ' 12000 merks, provided by the said contract, and, ' that in order to ascertain the appellant's share ' thereof, both parties do inform the Court of Session therein, according to the courses of that

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‘ Court, and that the said Court of Session do proceed thereupon, according to law and justice.’

For Appellant, *W. Noel, A. Hume Campbell.*

For Respondent, *William Hamilton, W. Murray.*

This reversal is not noticed in any of the reports of the case.

KENNETH M'KENZIE, - - *Appellant ;*
WILLIAM URQUHART, *et alii*, - *Respondents.*

26th January, 1741.

TAILZIE.—ACT 1685, c. 22.—An entail completed by infestment, but not recorded in the register of tailzies, is not effectual against the creditors of the heir of entail.

[*Elchies, voce Tailzie, No. 13.*]

No. 60. GEORGE VISCOUNT TARBET in 1688 executed an entail of the estate of Cromarty in favour of his second son, Sir Kenneth M'Kenzie, but reserved to himself a right of redemption upon payment of a certain sum. This entail contained all the necessary clauses of a strict entail, and was registered in the register of entails. Resignation followed—a crown charter was expedite, and infestment was taken by Sir Kenneth.

In exercise of the reserved right, Lord Tarbet did, in 1695, redeem the lands according to the

usual formalities, and the grant of redemption was registered in the register of sasines and reversions. Lord Tarbet then made another strict and complete entail, in terms of the former one; (only leaving out some lands, and disposing others,) also in favour of Sir Kenneth, with other substitutions. The entail was registered in the books of Council and Session, but not in the register of entails. Resignation followed; a charter was expedite, and infestment taken and recorded, and all the clauses of the entail were enumerated in the resignation, in the charter, and in the sasine.

Sir Kenneth continued in possession till his death in 1728, after having contracted large debts. His eldest son, Sir George, obtained possession upon a general service, as heir to his father, and also contracted large debts.

The creditors, (the respondents) who had used diligence upon their debts, then brought an action of sale for payment of their debts. The appellant, Sir Kenneth's second son, and next heir to Sir George, objected to the sale, on the ground that the debts were contracted in manifest contravention of the entail.

The creditors answered, that the former entail of 1688 having been extinguished by the recorded order of redemption, the claim of the creditors, and that of the heir of entail, depend entirely upon the effect of the entail of 1695; and that this entail not having been recorded in the register of tailzies, as required by the act 1685, is ineffectual against onerous creditors.

Upon the report of the Lord Ordinary, the Court found, (17th July, 1740,) 'that the entail 'not having been recorded in the register of

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 Entered
 November 19,
 1740.

'tailzies, as directed by the act 1685, can have no effect against onerous creditors upon the estate, who have affected the same by proper diligence.'

The appeal was brought from this interlocutor of the 17th July 1740.

Pleaded for the Appellant:—The judgment proceeds upon so strict an interpretation of the act 1685, as seems inconsistent with the principles of law and justice. Although the entail was not recorded in the register of tailzies, it was recorded in the books of Council and Session, which is a more ancient and a better known register than that appointed by the act of Parliament referred to.

The necessary clauses are also properly published, by being inserted in the charters of resignation and infeftments, and every other requisite has been complied with, except that of the recording in the register of entails, as to which the appellant contends that the statute has not been rightly understood nor justly interpreted:—because, although a register is appointed for entails, yet the act does not declare that the entail shall be ineffectual against creditors if not recorded, which would have been done if this had been intended. This is expressly provided in the case of the omission to insert any of the clauses in the rights of the several successive heirs of entail. The act declares that, in case of such omission, these clauses shall not militate against *bona fide* creditors; whereas, there is no such provision with regard to the non-registration of the entail.

Pleaded for the Respondent:—Where an entail is not recorded in the register appointed by the act, creditors contract *bona fide* with the possess-

ors of the estate, and, as has been frequently found, the entail can have no effect against them.

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The statute expressly declares that such entails only shall be allowed, where the original entail is once produced before the Lords of Session judicially, who are thereby ordered to interpose their authority thereto, and where it is recorded in the register book kept for that purpose.

After hearing counsel, "it is ordered and adjudged, &c. that the interlocutor complained of be affirmed."

Judgment,
26th Jan.
1741.

For Appellant, *James Erskine, Alex. Forrester.*
For Respondent, *Ch. Areskine, W. Murray.*

THOMAS BURNET OF KIRKHILL, - *Appellant*;
MAGISTRATES OF ABERDEEN, - - *Respondent.*

10th March, 1741.

TACK.—TEINDS.—A lease of teinds having been granted to A and his wife for their lifetime, and to their son for three nineteen years, the entry of the son, as well as of the father and mother, being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foresaid space, "next and after" baith their deceases,"—found that the tack to the son commenced at the same date with the liferent tack, and not at the expiration of it.

A tack of teinds being granted during the currency of an existing tack, with a declaration that the remaining years of the current tack should run after the termination of the new tack,—it was found that this was not an effectual grant of the additional years at the end of the new tack.

William, bishop of Aberdeen granted in 1576, No. 61. a lease of the teinds of the parish of St. Nicholas

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for nineteen years, to John Gordon of Cluny, and Margaret his wife, and the longest liver, and their heirs and assignees.

In April, 1585, while there were yet ten years of the above lease unexpired, David, then Bishop, in consideration of certain onerous causes, granted a new lease of the same teinds in favour of Gordon and his wife during their joint lifetimes, and that of the longest liver, and their assignees. The tack further bears, “ And sick like to have sett and in “ assedation lattin, and be this presents setts and “ in assedation lattis to John Gordon, thair second “ son, his heirs male, and assignees, &c. all and “ haill the said tiend sheavis,” &c. for the term of nineteen years “ next, and immediate followand the “ said John Gordon youngeris entries thairto; the “ quhilk entries thereto, of the said John Gordon “ younger, likeas of the said John Gordon his fa- “ ther, and Margaret Gordon his mother, *respec-* “ *tive* and *successive*, is, and God willing, *shall be* “ *the day and date of thir presents*, and frae thine “ forth the said John Gordon of Cluny, and Mar- “ garet Gordon his spouse, and their forsaid, and “ the longest liver of them, &c. to use joiss, and “ peacibly bruik the samen, for all the days and “ terms of their life, the langist liver of their tuais “ lifetimes. And the said John Gordon their son, im- “ mediate after baith their deceases, to use, &c. the “ samen quhile the space of nineteen years *next* “ *after baith their deceases*, be continuance, togid- “ der forthcumming without interruption, impedi- “ ment, or brake of terms or years.” “ And also, “ with consent foresaid, to have sett,” &c. “ to the “ said John Gordon and his forsaid, the said “ tiend sheavis,” &c. for “ other nineteen years

“ next and immediate followand the ische and
 “ compleit fulfilling of the said first nineteen years
 “ above wrytten, next and immediate followand
 “ his entres thereto ; the quilk entries thereto is,
 “ and God willing, sall be the day and date of thir
 “ presents.” And in like manner, there is a third
 grant for other “ nineteen years next and imme-
 “ diate followand the ische and compleit fulfilling
 “ of the said two nineteen years tacks above wryt-
 “ ten, next and immediate followand his entres
 “ thairto ; the quilk entres thairto is, and God
 “ willing, sall be the day and date of thir presents.
 “ And the said first entres *respective*, successive of
 “ the persons *respective* above mentioned, in and
 “ to the said tacks, to be sufficient, and to serve for
 “ the righteous entres of all and hail the said tiend
 “ sheavis above wrytten.”

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The deed then reserves the previous tack, in so far as then unexpired, and “ be thir presents
 “ ratifies the same, and consents that the same
 “ be eikt to the assedation made to the said John
 “ Gordon, and Margaret his spouse, and to John
 “ Gordon thair son, immediate after the ische of
 “ the three nineteen years tack above wrytten.”

In 1618, the Parliamentary Commissioners granted an augmentation of the stipend to the minister of St. Nicholas, and as a recompence for this augmentation they prorogated the lease by an additional term of 100 years, to commence from the expiration of the former lease of 1585. In that decree the lease is described as a tack made by the deceased David, Bishop of Aberdeen, with consent, &c. to the deceased John Gordon, and Margaret his wife, for their life-time, and that of the longest liver ; *and after*

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'their decease, to John Gordon, and to his heirs
'and assignees, for the space of three several nine-
'teen years.

The lease was also ratified and confirmed by Patrick Bishop of Aberdeen, with the consent of the Dean and Chapter, (24th April, 1620.)

Upon the abolition of Episcopacy in 1690, the revenues of the bishopric fell to the crown, and his majesty, in 1737, granted the said teinds of St. Nicholas to the Magistrates of Aberdeen and their successors, but reserving the right of all third parties.

The Magistrates brought an action of declarator and reduction, concluding that the right of the appellant (to whom the lease had devolved,) should be set aside, or at least that it should be declared to expire in April 1742, being three nineteen years, and 100 years from the date of the lease in 1585.

The appellant, on the other hand, brought a declarator to have it found, that in addition to these terms, the second lease endured for the lifetime of John Gordon and Margaret his wife, and the survivor, and for the additional ten years of the first lease.

The Lord Ordinary, (Drumore,) (28th January, 1739,) sustained the claim of the appellant to the whole extent he demanded, and *'found that he 'had right to the teinds contained in the said 'leases and decree until the year 1786.'*

The actions were afterwards conjoined, and came before Lord Kilkerran, who reported them to the Court; and their Lordships found, (13th February 1739,) *'that the three nineteen years 'did commence from the date of the tack 1585,*

‘and also found that the clause, ‘but prejudice of the former tack,’ and consenting that ‘the same might be eiked to the new lease, was ‘not an effectual grant of an additional term at ‘the end of the new tack, and remitted to the ‘Lord Ordinary to proceed accordingly.’

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The Court adhered (23d February, 1739,) and the Lord Ordinary in consequence found, (27th February,) ‘that the lease expired on the 12th ‘April, 1742, and that the respondents had right ‘to the teinds after the said date.’

The appeal was brought from the interlocutors of the 13th, 23d, and 27th February 1739.

Entered
Dec. 3, 1740.

Pleaded for the Appellant:—1. At the date of the lease in question, the Scottish bishops had sufficient powers to grant leases of their teinds, for such periods as they thought proper; and such leases, for one or more lives, and, after the determination of these lives, for one or more nineteen years, were very common, and authorised by law, particularly by the act 1606, c. 18. These powers were not limited till the act 1617, c. 22, by which, however, power was reserved to the Parliamentary Commissions to grant prorogations.

2. It appears from the terms of the lease, that the three nineteen years lease to John Gordon, the son, were not intended to include, but were over and above the liferent lease. His father and mother were to hold absolutely during their lives, and the life of the survivor; and he himself was absolutely to have, and beneficially to enjoy three nineteen years, “next after baith their deceases,” and the object of declaring the entry to the reversionary lease to be at the same time with the entry to the lease in possession, could only be, in point of form, to substantiate

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the reversionary lease, because it was then doubtful whether a lease in such circumstances without entry was effectual.

3. Both the Parliamentary Commissioners in 1618, and Patrick Bishop of Aberdeen, in 1620, understood the lease in this sense, and a different construction ought not now to be put upon it, when the true meaning of it cannot be so well understood.

Pleaded for the Respondents :—1. By the express words of the lease 1585, it is declared, that the commencement of the lease to John, the son, as well as of that to John the father, and his wife, was the day and date of the instrument itself, and, therefore, the appellant pleads in opposition to the deed upon which he founds, when he avers, that the commencement of the term of three nineteen years was not to be at the date of the instrument, but after the decease of his father and mother. For the first nineteen years are expressly stated to commence from the entry of the son, which entry is expressly provided to be the day and date of the lease : and the same expression is several times repeated.

2. There was also good reason for making the date of the instrument the date of the commencement of the son's right, for, by the law of Scotland, if the commencement of a lease granted by a bishop, happened after his death or translation, the lease was void, the entry being *collatum in tempus indebitum*, and it was probably in order to guard against this event that the lease was conceived in the terms it bears.

3. With regard to the ten years of the original lease which were unexpired, the only effect of the proviso,

by which the second lease was declared to be *without prejudice to the first*, was, that as the commencement of the second lease had been declared to be at the date thereof, the term of the two leases thus coinciding should run on together ; and moreover, although by lapse of time the lease granted by Bishop David might be secured against objections to it; yet prescription, or the lapse of time, could never transfer the term of ten years that remained of the lease granted by Bishop William, and stop the currency of it from the year 1585, until the three nineteen years in Bishop David's lease, and the one hundred years of prorogation were expired, and upon the determination of the same, to begin to run and stand as a good lease during these ten years.

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DEEN.

After hearing counsel,—“it is ordered and adjudged, &c. that the said petition and appeal be, “and is hereby dismissed this House, and that the “said interlocutors therein complained of be, and “the same are, hereby affirmed.”

Judgment,
10th March,
1741.

For Appellant, *James Erskine, W. Murray.*
For Respondent, *Ch. Areskine, A. Noel.*

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FERGUSON, &c.
v.
CRIE, &c.

WILLIAM FERGUSON, *et alii*, - - - *Appellants* ;
JAMES CRIE, *et alii*, - - - - - *Respondents*.

7th April, 1741.

BURGH ROYAL.—ACT 7. GEO. II. c. 16.—An election of Magistrates set aside at common law on account of an unlawful separation of the members by whom they were chosen, although not falling under the above act.

[*Elchies voce* Burgh Royal, No. 16.]

No. 62. By the constitution of the city of Perth, the Town Council consists of twenty-six members ; of whom fourteen are merchant counsellors, and the other twelve are trades counsellors ; out of this number the provost and magistrates are annually elected.

The first step in the election is, that the old merchant counsellors proceed to the election of the merchant counsellors for the ensuing year, and the next is the election of two new trades counsellors, which is made by the whole town council, from leets presented by the trades. Thereafter, the new council of merchants and tradesmen elect the provost and other magistrates of the year. At the meeting for the annual election in 1740, the trades counsellors, with three of the merchant counsellors, insisted upon certain queries being put to the other eleven merchant counsellors, upon oath, before proceeding to the election ; and the

provost having declined to do this, they entered a protest, that none of the eleven counsellors, who had refused to make answer as to the queries, should be admitted to vote ; and after taking another protest, they withdrew from the meeting.

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Upon this, the eleven remaining old merchant counsellors proceeded, in the first place, to the election of the new merchant council ; they then chose the new trades counsellors, and the whole afterwards proceeded to the election of the magistracy in the usual way. On the other hand, the three remaining merchant counsellors, and the twelve trades counsellors, having met together, proceeded to make a separate election.

Mutual actions of reduction and declarator were brought. The three merchant counsellors and the trades counsellors, with the new members chosen by them (the appellants,) insisting that the other party had separated from them, and therefore that their election fell under the act of the 7th Geo. II. and also that they had disqualified themselves from voting at the election, by entering into unlawful combinations ; to prove which was the object of the questions which had been proposed, but which the provost had declined to put.

On the other hand, the merchant counsellors, with their new members, maintained, that the separation of the appellants fell under the above act, " for the better regulating of elections," &c. and annulled their proceedings, and was also unlawful at common law.

The case being taken to report on informations, the Court found, (15th June, 1740,) " That the " separation in this case of the three merchant counsellors and the trades counsellors, does not fall

1741. " under the act of the 7th of his present Majes-
 FERGU- " ty."*

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A conjunct probation was then allowed, (and particularly as to the alleged combination,) upon advising which, the Court (12th Feb. 1741,) " Found the reasons of reduction of the election of " Provost Ferguson and his adherents, relevant and " proven, and therefore reduced the said election " of William Ferguson and his adherents, and de- " cerned; and further, repelled the reasons of " reduction of the election of Provost James Crie " and his adherents, and assoilzied."

Entered Feb.
 19, 1741.

The appeal was brought from this interlocutor of the 12th Feb. 1741.

Pleaded for the Appellants :—The election of the respondents was made by a minority, who had separated themselves from the majority, and therefore falls within the act referred to, which must apply to a separation of measures, as well as of place; whereas the appellants were chosen by a majority of the whole town counsellors, consisting both of merchant and trades counsellors, which is necessary to constitute a quorum, and which did not take place in the election of the respondents, there not being one trades counsellor present at their proceedings.†

Pleaded for the Respondents :—The election of the respondents was agreeable to the constitution of the burgh; and according to the usual manner

* " Which statutes only in the case of a minority separating from a majority."—*Elchies*.

† The charge of unlawful combination was renewed; but as no notice is taken of it in the judgment of the House of Lords, and the election of the respondent is sustained, it is unnecessary to notice it further.

in all preceding elections. The council was legally summoned and constituted in due and proper form. The new merchant council were elected by a large majority of those who had the only right to vote, viz. the eleven of the old merchant council, and, of course, they had a right to vote in all the subsequent steps which took place.

If the three merchant counsellors had remained, they would have formed the minority in the election, which would notwithstanding have been valid, and their withdrawing have the effect of invalidating the election.

On the contrary, their conduct was illegal, as they separated from the town council, who were lawfully assembled to proceed to the election, so that their election is good for nothing; and it is also null, because at the election of the merchant counsellors, which is the foundation of the whole, there was not a quorum of the electors, there being only three out of fourteen electors.

After hearing counsel, "it is ordered and adjudged, &c. that the interlocutors complained of be affirmed."

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SON, &c.
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CRIE, &c.

For Appellants, *W. Murray, Al. Forrester.*

For Respondents, *Will. Hamilton, C. Erskine.*

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STEWART
v.
DENHAM.

ARCHIBALD STEWART, *alias* DENHAM, *Appellant*;
ALEXANDER DENHAM, - - - *Respondent.*
et è contra.

8th April, 1742.

TAILZIE,—IRRITANCY.—Found that under an entail prohibiting “debts, whereby the estate *may* be adjudged or evicted,” the contracting of personal debts, on which no diligence had followed against the estate, does not infer an irritancy.

Found that the arrear of an annuity reserved to the entailer’s widow, is the debt of the entailer, and not of the heir in possession, although the annuity should have been paid by him.

The heirs being prohibited under an irritancy from “contracting debts, or doing other deeds of *omission*, or commission, where—“by the lands, or any part thereof, may be adjudged,” &c. and the entailer’s widow having led adjudication for the arrears of her annuity.—Found that the right of the heir in possession was not thereby irritated.

[Elchies *roce* Tailzie, Nos. 9 and 13. Kilk. *ibid.* No. 1. Fol. Dict. II. p. 434. Mor. Dict. p. 15557. Brown’s Supp. V. p. 657.]

No. 63. In consequence of the reservation contained in the judgment of the House of Lords, 17th July, 1737,* in the case between the same parties, Archibald Stewart proceeded before the Court of Session upon the other irritancies contained in his original libel.

The first of these was that which Sir Robert Denham was alleged to have incurred by contracting debts, for which he had given bonds and other securities. It was admitted, that Sir Robert had contracted debts to a considerable amount; but it was contended, that as those debts were not actually made a lien upon the estate, they did not fall within

* *Supra*, page 333.

the spirit of the condition, although they might within its letter. *Answered*, that the spirit as well as the letter of the condition was broken by contracting debts, the maker of the entail having not only prohibited the contracting of debts, but even provided that such debts should not affect the lands, although they actually defeated the right of the contractors; it being his intention that the person succeeding to the estate should take it free from suits as well as from incumbrances. Neither was it extraordinary that the entailer should annex a forfeiture to the contracting of such debts as the Court of Session afterwards determined did really affect the lands, although this determination has since been reversed.

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DENHAM.

The Court (15th Dec. 1737) found, "That the simple contracting of personal debts, on which no diligence followed against the estate, does not infer an irritancy of the contractor's right."

The next point was founded upon the clause, whereby the penalties of the entail are extended to any person who shall "contract debt, or do other deeds of omission or commission, whereby the said lands, and others foresaid, or any part thereof, may be appraised, adjudged, evicted, or become caduciary, escheat, or confiscate," &c. But it is afterwards provided and declared, that if "any appraising, adjudication, or other diligence, shall be led and deduced against the said lands and others foresaid, or any part thereof," for sums already contracted, or to be contracted hereafter by the said Sir William Denham, (the entailer,) or for any part of the said sums; "then and in that case, the haill heirs and members of tailzie above specified, who shall happen to bruik

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“ and possess the said lands and others aforesaid
 “ for the time, shall be bound and obliged to purge
 “ the said diligences three years before expiring of
 “ the legal thereof, in case they shall happen to
 “ succeed thereto three years and six months be-
 “ fore expiring of the said legal ; and if they suc-
 “ ceed not so soon, they shall be obliged to purge
 “ the same within six months after their succes-
 “ sion,” under pain of forfeiture of their right in
 case of contravention.

There is also a clause, reserving to dame Katherine Erskine, the entailor's wife, “ her liferent in-
 “ feftment of such parts and portions of the lands,
 “ or the yearly annuity payable to her forth there-
 “ of, as is provided to her by her contract of mar-
 “ riage or otherwise.”

Sir Robert Denham having allowed this annuity to remain unpaid for two years, the widow, in Jan. 1718, led an adjudication against the lands for the arrears, amounting to L.500. Sir Robert died in 1721, without having paid any part either of the principal or interest, and they remained unpaid till 1726, when the appellant obtained possession in virtue of the interlocutors declaring the irritancy, and when by discharging the whole he cleared off the adjudication.

The Court (22d Dec. 1737) found, “ that the
 “ irritancy is incurred, by suffering an adjudication
 “ to pass for the liferent annuity due to the wi-
 “ dow.”

In a reclaiming petition, it was argued that the arrears of the annuity incurred in Sir Robert's time could not be regarded as a debt contracted by him, but were in fact a debt of Sir William, the entailor, and therefore no forfeiture was incurred by the

former, in suffering adjudication to be led for them, the forfeiture for such debts being incurred only by his omitting to purge the adjudication before the expiry of the legal.

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DENHAM.

Answered, the arrears incurred in Sir Robert's time were properly his debt. The arrears of every year or term are a distinct debt, upon which distinct adjudications might be obtained, and distinct prescriptions would run ; and therefore if the possessor of the estate might, without incurring a forfeiture, permit the annuity to run in arrear for any number of years, and suffer several adjudications to be led for the different years' arrears, the whole estate must sink under the incumbrance.

The Court (12th July, 1738) altered their former interlocutor, and found, "That the irritancy is "not incurred by Sir Robert Denham's suffering "an adjudication to pass for those annuities, which "fell due during the said Sir Robert Denham his "possession of the estate."

A third ground of irritancy was, that the lands had been underlet ; but a proof being allowed, the Court, upon the report of the Lord Ordinary, (23d Dec. 1740) Found, "That there is no such evidence of the diminution of the rental, as to incur "the irritancy of the entail of the said estate."

The appeal was brought from the interlocutors of the 15th Dec. 1737 ; 12th July, 1738 ; 16th July and 23d Dec. 1740.

Entered
Jan. 12, 1740.

Pleaded for the Appellant:—1. Sir Robert Denham incurred the irritancy by contracting debts, although no legal diligence has actually ensued ; because the very words of the irritant clause extend not only to debts upon which diligence has ensued, but also to debts whereupon diligence may ensue.

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The intention of the entailer was not simply to prohibit the contracting of such debts as should directly affect the estate, because he has provided that the debts contracted should not be a charge upon it, although he annexed a forfeiture to the very act of contracting them. He had it in view to save his successor in the estate from the expense and trouble of defending it against the claims of creditors, who might subject the possessors of the estate to great expense, even although they did not succeed against him, as in fact happened in the present instance in the question between the appellant and James Baillie.*

2. Sir Robert Denham incurred an irritancy, by suffering an adjudication to be led for the arrears of the annuity payable to Sir William's widow. For although the annuity was created by Sir William's contract, yet it was due by Sir Robert while he possessed the estate, and it was only by his omission that any arrears of the annuity were incurred. These arrears, therefore, are to be considered as Sir Robert's debt, it being plainly by his neglect that they became an incumbrance on the estate, and thereby occasioned the adjudication led by the grantee of the annuity.

Debts of this nature were the debts which it was most incumbent on the maker of the entail to provide against, because these must affect the estate in the hands of any of the heirs of entail ; whereas debts of any other nature were prevented by the provisions of the entail from becoming a charge upon the estate. For this reason, debts occa-

* *Supra*, p. 114.

sioned by *omission* are expressly mentioned in the clause above quoted.

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But it is evident, that should the construction contended for by the respondent be admitted, it would be in the power of any possessor of the estate to defeat the whole entail. He might suffer the annuity to run in arrear for ten as well as for two years, and allow several adjudications against the estate before a forfeiture could be incurred; and when the incumbrances had swelled to that height, it would not be the interest either of the possessor, or of any other heir of entail to purge the adjudications.

Pleaded for the Respondent:—1. By no reasonable construction of the clause prohibiting the heirs of entail to contract debts, whereby the lands may be appraised, adjudged, or evicted—nor by any words of the statute 1685, (upon the plan of which this entail was formed,) can the simple contracting of personal debts, which have never been made real upon the estate, and upon which no diligence by adjudication or otherwise has followed, be deemed sufficient to import a forfeiture against the person so contracting for himself and the descendants of his body. If such were the construction of law, every heir of entail must unavoidably forfeit his estate, as a thousand occasions daily occur, which render it impossible altogether and absolutely to avoid contracting debt, even in purchasing the common necessities of life, &c.; so that if the appellant's argument prevails, an heir of entail would forfeit his estate if he should owe any one of his tradesmen the smallest item even for the space of twenty-four hours.

2. The adjudication which Sir Robert allowed

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to pass for the arrears of the annuity due to Sir William's widow, was not upon any debt contracted by Sir Robert. On the contrary, this annuity was constituted by Sir William himself, the entail-er, in his own contract of marriage, and made a real burden upon the estate; and therefore Sir Robert's suffering decree of adjudication to pass, was not a contravention of the first prohibitive clause, by which the several heirs of entail are prohibited from contracting debts, whereby the lands may be adjudged or evicted.

By the other clause it is provided, that if any adjudications or other diligences shall be deduced against the tailzied lands for sums already contracted, or to be contracted by Sir William Denham the entail-er, the heirs of entail shall be bound to purge the said diligences three years before the expiry of the legal, with an express declaration, that the heir failing to do so shall irritate his right for himself and the descendants of his body; whereby it is perfectly manifest that no forfeiture is incurred by Sir Robert's having suffered the adjudication to pass for the arrears of an annuity which was constituted by Sir William himself in favour of his own lady.

Upon the reversal by the House of Lords of the judgment in the former case, Alexander Denham presented a petition to the Court of Session, setting forth that Archibald Stewart had obtained and continued possession upon no other title than that decree, and that, it having been reversed, the estate ought now to be sequestrated, and the interim rents applied to the payment of the widow's annuity and the other burdens. Answered, that he ought not

to be dispossessed before judgment upon the other points in the declarator of irritancy, more especially as he had paid sundry debts, and expended considerable sums of money upon the faith of that decree, which at all events ought to be repaid before he could be obliged to cede possession.

A remit was made to the Lord Ordinary to report upon the payments made by Archibald Stewart of debts chargeable on the estate; and after various proceedings, the above appeal having been entered in the original cause, the following interlocutor was pronounced, (19th January 1742,) "At advising the petition, it appeared to the Lords, that there was an appeal served in the cause, and although it was contended for the petitioner that those petitions for sequestrations was no part of the process appealed from, the Lords refused to proceed in this petition."

A cross appeal was brought from this interlocutor of the 19th January 1742, and from others of the 13th July 1737, and 13th July 1739.

After hearing counsel, "it is ordered and adjudged, &c. that the said original and cross appeals be, and are hereby dismissed; and that the said several interlocutors therein complained of be, and the same are hereby affirmed."

For the Appellant, *A. Hume Campbell, James Erskine.*

For the Respondent, *Alexander Lockhart, W. Murray.*

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Entered
Feb. 2, 1742Judgment,
8th April,
1742.

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LESLIE
v.
LESLIE.

CHARLES CAJETAN, COUNT LESLIE, - *Appellant* ;
JAMES LESLIE, Esq. of Pitcaple, *et alii*, *Respondents*.

LEOPOLDUS, Eldest Son of the said }
COUNT LESLIE, - - - - - } *Appellant* ;
The said JAMES LESLIE, *et alii*, - *Respondents*.

ANTONIUS, Second Son of the said }
COUNT LESLIE, - - - - - } *Appellant* ;
The said JAMES LESLIE, *et alii*, - *Respondents*.

29th April, 1742.

TAILZIE.—CLAUSE.—Found that a clause providing “ that in
“ case any heir of entail should succeed to a certain other
“ estate, he and the heirs male of his body so succeeding,
“ should be obliged to denude in favour of the next heir ;” and
that the estate in that event should be redeemable “ from the
“ said heirs male who shall succeed to both the said estates,
“ and his heir male foresaid,”—has not the effect of excluding all
the heirs male of the body of the person so succeeding (so as
to make room for the next branch,) but only his eldest son,
or heir apparent ; and the succession opens to the second
son.

No. 64. ALEXANDER LESLIE of Balquhain had four sons,
James, Patrick, William, and Alexander. His
brother, Walter Leslie, acquired a large estate in
Germany, and was created a Count of the em-
pire.

Walter died without issue, and was succeeded
by James, the eldest son of Alexander ; and Patrick
succeeded to the paternal estate in Scotland. James
had no issue ; Patrick, by his first marriage, had
issue, James Ernest, by his second, George, Mar-
jory, and Anne ; James Ernest had issue, Joseph

(who died without issue) and Charles Cajetan Count Leslie; Charles Cajetan had issue, Leopoldus, Antonius, and Carolus; George (the son of the second marriage) had children, but they died without issue; Marjory the eldest daughter was married to Alexander Leslie of Pitcaple, and had issue, James Leslie, the respondent. Count Patrick, upon the recital that he wished to keep the two estates distinct, and that he had already secured his eldest son James Ernest in the succession of the German estate, executed an entail of the estate in Scotland, (8th November 1692,) disposing it "to himself in liferent, and to George Leslie, his second son, and the heirs male of his body, whom failing, to the heirs male of his own body of that or any other marriage, and to the heirs male of their bodies, (with other substitutions,) which failing, to the heirs female of the body of the entailer."

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There were two clauses of devolution in the entail. The first provided for the case of George or the heir male of his body succeeding to both estates.

The second clause, under which the present question arose, was as follows:—"And in case it shall happen any other heir male of my body to succeed to both the said estates; in that case, the foresaid estate of Balquhain shall fall and belong to the next heir male to be procreate of my body of this or any other marriage, which failing, to the subsequent heirs of tailzie aforesaid, to whom the said *heir male*, and *the heirs male of his body* who shall succeed to the German property, shall be obliged to dispoise and resign the foresaid lands of Balquhain; and the same shall from henceforth be redeemable by the other, and next heirs

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“ male to be procreate of my body of this or any
 “ other marriage, and the other heirs of tailzie
 “ aforesaid, from the said heirs male, who shall
 “ succeed to both the said estates, and his *heir*
 “ *male foresaid*, by payment of the said sum of
 “ ten merks.”

Count Patrick afterwards made a new entail, containing some variations, and disposing the estate,—failing the heirs male to be procreate of his own body of any other marriage, and the heirs male of their bodies,—to Charles Count Leslie, second son of James Ernest, with other substitutions, which failing, to James Leslie, the respondent, eldest son of Marjory, &c.

The heirs under this new entail are also bound to adhere to the above condition of devolution, as well as to the other provisions of the former entail.

Under these settlements the estate was possessed after Patrick's death by his son George, and then by George's sons in succession. After their death, without issue, the succession opened to Count Charles, who had already succeeded to the German property.

In virtue of the clause of devolution above referred to, three several actions of declarator were brought before the Court of Session against Count Charles,—the first by his eldest son Leopoldus, as the next heir of tailzie after him ; the second by his second son Antonius, as next heir other than Leopoldus ; and the third by James Leslie of Pitcaple, the son of Marjory, as next heir after all the male issue of Count Charles, who, he maintained, were all excluded. On the other hand, Count Charles contended that he was not bound to denude in favour of any of the claimants.

The Court, upon the report of the Lord Ordinary, found, (20th February, 1741,) "That it being provided by the deed of entail," &c.* "and that the estate of Balquhain shall be redeemable by the other and next heir male, and the other heirs of tailzie foresaid, from the said heir male who shall succeed to both estates, and his heirs male aforesaid, for payment of the sum of ten merks; that Charles Count Leslie, being an heir male of the said Patrick's body, and having, in terms of the said clause, succeeded to both estates, that he, and the heirs male of his body, are obliged to denude of the estate of Balquhain in favour of the next heir of tailzie: and found that Charles Count Leslie, and the heirs male of his body, being thus excluded from the estate of Balquhain, in the event that has happened of his succeeding to both estates, the respondent, James Leslie of Pitcaple, is the next heir of tailzie to whom the estate of Balquhain now devolves; and that Charles Count Leslie is obliged to denude in his favour; and that Leopoldus and Antonius Leslies, being, by the substitution in the entail, called to the succession in their order, only as heirs male of the body of the said Count Charles, they are, in like manner, as heirs male of his body, excluded from the succession to the estate of Balquhain, in the event that hath now happened of their father succeeding to both estates; and that, therefore, Count Charles, their father, cannot denude in their favour, but ought to denude in favour of the said James Leslie, the next heir, and therefore decerned," &c.

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* The first part of the interlocutor contains merely a recital of the clauses of devolution in the entail.

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 Entered
 Dec. 18, 1741.

The Lords adhered, (27th February 1741.) Three several appeals were brought from these interlocutors of the 20th, and 27th February by Count Charles, by Leopoldus his eldest son, and by Antonius his second son.

Pleaded for Count Charles :—The plain intention of the clause, “that the heirs male of Patrick’s body succeeding to both estates should resign the estate in Scotland,” could only be to oblige such heirs to divest themselves who should succeed in virtue of the destination in the same deed, “to the heirs male of Patrick’s body by that or any other marriage.”

It could not be intended that these words should be understood in a more extensive sense in the clause of devolution than in the clause of destination. Under the latter clause, the entailor did not comprehend the descendants of his eldest son James Ernest, for Count Charles is called by a distinct and posterior substitution. Therefore neither can the clause of devolution have a greater effect so as to affect these descendants. The words must have the same import in both parts of the deed.

2. The construction put upon this clause is repugnant to the terms of it; for although Count Charles is heir male to Patrick, yet he never could be an heir male who could resign in favour of any heir male of Patrick’s body, of that, or any other marriage; for he never could have succeeded while there were any other such heirs male. Now it was not the intention of the entailor to restrain all persons succeeding to both estates from retaining both; but only to keep the estates separate, while the entailor had an heir male of his body who could enjoy the Scottish estate singly.

Pleaded for Count Leopoldus :—In virtue of

the condition referred to, the heir succeeding to both estates is bound to denude in favour of the next subsequent heir of tailzie in the order of succession thereby appointed, and it is undoubted that the appellant is the next heir.

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It is not denied that the heirs male of Count Charles are preferred to James Leslie, the son of Marjory. The sole intention of the proviso was, that the two estates should be kept separate; whereas, by the construction put upon it by the Court below, the respondent, and the heirs female of Count Charles, are to succeed before any of Count Charles's sons, though none have as yet succeeded; and some of them, in all probability, never will succeed to the German estate.

Although not only the heir male succeeding to both estates, but the heirs male of his body, are bound to denude—these words are not to be extended farther than the sense necessarily demands; and the plain sense is, that these heirs male shall only denude of the one when they succeed to the other, and it would be hard to exclude the apparent heir to the German estate, as he may possibly never succeed to that estate.

Pleaded for Count Antonius :—It is not all the heirs male of the body of the persons succeeding to both estates who are excluded, but only that heir male who shall succeed to the German estate. The Scottish estate is declared to be redeemable from the heirs male succeeding, and from his heir male aforesaid; by which expression, the general description of heirs male is restricted to the apparent heir male, or the eldest son of the person succeeding, who is the only proper heir male.

The general purpose of the two entails was, that the Balquhain estate should always devolve to

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the second son of the person succeeding to both estates ; and it was never intended that the female descendants of the entailer should succeed, as long as there was any such second son capable of enjoying it.

It could not have been intended that all the male descendants of the person obliged to denude should be deprived of that right of succession which they were otherwise entitled to. The second son of this person is uniformly preferred. If George had succeeded to the German property, his second son, by the express terms of the deed, must have succeeded to Balquhain ; and yet, in another part, George, and the heirs male of his body who shall succeed, are bound to denude.

If the words do not necessarily import an exclusion of all the male descendants of the person succeeding, there can be no reason for giving it such a construction. The only intention was, that the two estates should be possessed by different persons, and this intention is as fully answered by the succession of a second son as it can be by that of the remotest relation.

*Pleaded for James Leslie :—*Count Charles must denude, as the express purpose of the settlement was, that the same person should not possess both estates.

The words, “other heirs male of my body,” necessarily apply to all the heirs male of the entailor’s body, other than George and his male descendants, whose succession to both estates is regulated by the preceding clause.

Count Charles cannot denude in favour of Count Leopoldus, otherwise instead of establishing a separate representation of the family in the Scottish

estate, that estate would become merely an appendage to the property in Germany.

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LESLIE.

Count Charles is not bound to denude in favour of Antonius.

1. Because in terms of the settlement, the person who loses or irritates his right, irritates for himself, and the heirs male of his body, *i. e.* his whole male descendants.

2. If Antonius is not considered as an heir male of the body of Count Charles, he is not called to the succession; if he is considered as such, he is excluded by the devolving clause.

3. By the law of Scotland, irritant clauses in entails either exclude the person only who irritates, so as to make the estate descend to his next heir, or they exclude the whole descendants of his body, and make way for the next branch. The law knows no other alternative; and as none other is provided by the entail, the succession now opens to the next branch.

But Count Charles is to denude in favour of the respondent, because he is manifestly the next person in the line of succession after Count Charles, and the heirs male of his body.

After hearing counsel, “it is ordered and adjudged, &c. that the said appeals of Charles Cajetan Count Leslie, and Leopoldus Count Leslie, be, and the same are hereby dismissed; and upon the said appeal of Antonius Count Leslie, it is ordered and adjudged, that the said interlocutor of the 27th February 1741, be, and the same is hereby reversed, and that at the latter end of the recital in the said interlocutor of the 20th February, 1741, after the words, (‘from the said’) the following words, (“heir male who shall suc-

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“ceed to both estates, and his heirs male,”) be
“left out, and these words, (‘heirs male who shall
‘succeed to both the said estates, and his heir
‘male,’) be inserted instead thereof, and that after
“the words, (‘that he and,’) the following words,
“ (‘the heirs male of his body,’) be left out, and
“these words, (‘his eldest son as his heir male,’)
“be inserted instead thereof; and it is further or-
“dered and adjudged, that so much of the inter-
“locutor of the 20th February, 1741, whereby
“the Lords of Session found, ‘That Charles Count
‘Leslie, and the heirs male of his body, being thus
‘excluded from the estate of Balquhain, in the
‘event that hath happened of his succeeding to
‘both estates, the respondent, James Leslie of
‘Pitcaple, is the next heir of tailzie to whom the
‘estate of Balquhain now devolves; and that Char-
‘les Count Leslie is obliged to denude in his
‘favour; and that Leopoldus and Antonius Leslies,
‘being, by the substitution in the entail, called to
‘the succession in their order, only as heirs male
‘of the body of the said Count Charles; they are,
‘in like manner, as heirs male of his body, exclud-
‘ed from the succession to the estate of Balquhain
‘in the event that hath now happened of their
‘father’s succeeding to both estates; and that,
‘therefore, Count Charles, their father, cannot de-
‘nude in their favour, but ought to denude in
‘favour of the said James Leslie, the next heir;
‘and, therefore, they decerned the said Charles
‘Count Leslie to denude himself of the estate of
‘Balquhain in favour of the said James Leslie of
‘Pitcaple, and declared the same redeemable by
‘the said James Leslie of Pitcaple from the said
‘Charles Count Leslie, and the heirs male of his

‘ body, for payment of the sum of ten merks Scots
‘ money, in terms of the said entail,’ be, and the
“ same is hereby reversed, and it is hereby declar-
“ ed that the appellant, Antonius Count Leslie,
“ second son of the said Charles Cajetan Count
“ Leslie, is the next heir of tailzie to whom the said
“ estate of Balquhain, in the event which hath
“ happened, devolves, according to the true intent
“ and meaning of the deed of entail in the said
“ appeals mentioned; and it is further ordered and
“ adjudged, that the said Charles Cajetan Count
“ Leslie do denude himself of the estate of Bal-
“ quhain in favour of the said Antonius Count
“ Leslie; and it is hereby declared, that the same
“ be redeemable by the said Count Antonius from
“ the said Charles Cajetan Count Leslie, and his
“ eldest son, as his heir male, for payment of the
“ sum of ten merks Scots money in terms of the
“ said entail; and it is further ordered, that the
“ residue of the said interlocutor of the 20th
“ February, 1741, not before reversed or varied,
“ be, and the same is hereby affirmed; and that
“ the said Lords of Session do give the necessary
“ directions for carrying this judgment into exe-
“ cution.”

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v.
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For Count Charles,	-	{ Alex. Lockhart.
		{ Ch. Erskine.
For Count Leopoldus,	-	{ James Erskine.
		{ Alex. Forrester.
For Count Antonius,	-	{ William Grant.
		{ Wm. Murray.
		{ Ro. Craigie,
For Leslie of Pitcaple,	-	{ Wm. Noel,
		{ A. H. Campbell.
		{ Jas. Graham.

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EDGAR
v.
MAXWELL.

THEODORE EDGAR, - - - *Appellant*;
JAMES MAXWELL, *alias* JOHN- } *Respondent*.
STONE, - - -

31st May, 1742.

FIAR ABSOLUTE AND LIMITED.—An estate being settled in a marriage contract upon the heirs male of the marriage; whom failing, upon the heirs male of the body of the husband by any other marriage; whom failing, upon the heirs female of the marriage; found that the heir male of the second marriage, who succeeded to the estate, might gratuitously dispose of it to the exclusion of the substitutes, the heirs female of the first marriage.

SERVICE OF HEIRS.—A person being entitled to succeed to lands in virtue of two conveyances, with different destinations, but neither of which imposed or inferred a prohibition to alter, as against him, may, after making up titles upon one of them, exclude, by a gratuitous disposition, the heirs under the other.

[Kilk. pp. 148—192. Fol. Dict. 1, 192—200. Elchies, *voce* Service of Heirs, No. 2; *voce* Service and Confirmation, No. 6; Mor. 3089—4325.]

- No. 65. JOHN JOHNSTONE being infeft in the lands of Elshieshiels, which by the investitures stood provided to heirs male, did, upon the marriage of his son Alexander with Marion Grierson, and in terms of the marriage contract, settle the said lands upon Alexander, and the heirs male of the marriage; whom failing, upon the heirs male of the body of Alexander of any other marriage; whom failing, upon the heirs female of the marriage; and he granted procuratory of resignation in favour of the said heir, but there was no provi-

sion in the contract that Alexander should take up the estate by virtue of that title only.

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By a clause in the settlement, reciting, that in case Alexander should have heirs male by any other marriage, the issue female of this marriage would be excluded from all benefit of succession to the estate, a particular provision is, in that event, made for the daughters of this marriage.

Of this marriage, the only issue were two daughters, the eldest of whom had a son, Theodore Edgar.

By a second marriage, Alexander had issue two sons, Gavin and Alexander.

Upon the death of John Johnstone, the procuratory of resignation not having been executed, Alexander his son was, in 1688, served and retoured heir male in special to his father in the lands, conformably to the standing investiture in favour of heirs male. Upon Alexander's death, Gavin, his eldest son, was in like manner served and retoured heir in special to him in the same manner, and was infest; and Gavin having died without issue, his brother Alexander made up titles in the same way. He then executed a gratuitous disposition of the estate in favour of his half brother Maxwell, the respondent. In the mean time, the daughters of John Johnstone had received payment of their provisions under the marriage contract.

Upon the death of Alexander, Theodore Edgar took out briefes, in order to have himself served heir of provision under the marriage contract.

He was opposed by Maxwell, who claimed under the disposition executed in his favour by Alexander last mentioned.

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MAXWELL.

There were thus two questions: 1. Whether Alexander, the son of the second marriage, could, by a gratuitous settlement, dispose of the estate in prejudice of the heirs female of the first marriage, and

2. Whether this Alexander, not having made up a title as heir of provision under the marriage contract, so as to vest himself with a right to the procuratory, but having only been served and retoured as heir male under the ancient investiture, had power to dispose of the estate.

The Court of Session, upon the report of the Lords Assessors, found, (6th July, 1736,) "that the son of the second marriage might gratuitously alter the destination in the contract of marriage, and 2. Repelled the objection that the right to the provision in the contract of marriage had not been established in the person of Alexander Johnstone; in respect of the answer, that the real right of the estate was established in the said Alexander's person."*

Edgar reclaimed, and pleaded further, that to some parts of the lands settled by the marriage contract, Alexander, under whose deed alone Maxwell claimed, *never had been served heir, or made up any title whatsoever*; that he could not therefore dispose of these lands, but that they must necessarily belong to the petitioner, as

* Upon the second point it was held, that "where one has it in his power to make up his right to an estate by either of two titles, *ex. gr.* either upon the destination in his marriage contract, or upon the ancient investiture of the estate, and is under no restraint which of the two he shall chuse; if he chuse to make up his title on the one, *ex. gr.* upon the ancient investitures, and convey away the estate as in the present case, no subsequent heir can take up the estate by virtue of the provision in the contract of marriage, and thereupon quarrel that conveyance."—(Kilkerran.)

heir of provision. The Court, upon advising this petition, with answers, (29th July,) adhered,—but remitted to Lord Elchies, Ordinary, to hear parties on the point with relation to the lands in which Gavin and Alexander Johnston had not been infest.

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Upon this point it was maintained by Maxwell, that the service of Alexander, as heir male to his father, implied that he was heir male of the marriage, and of consequence entitled him to the procuratory of resignation in the settlement, as heir of provision.

The Court, however, upon the report of the Lord Ordinary, (21st July, 1738,) found “ that Gavin Johnston’s service as heir male in general to his father, did not carry right to the procuratory of resignation contained in the contract of marriage, which was destined to heirs male of the marriage with Marion Grierson; and that, therefore, Theodore Edgar, the heir female of the marriage, may be served heir of provision to the procuratory of resignation.”* Edgar was served accordingly, and thereafter,

An appeal was brought by him from the interlocutors of the 6th and 29th July, 1736.

Entered
Dec. 22, 1738.

Pleaded for the Appellant :—The heirs male of John, to whom the estate was by the old investiture to descend, were bound by the marriage contract to perform the engagements then entered into in behalf of the heirs appointed by the contract. The only right which Alexander the younger transferred by his disposition, was the right which

* Kilk. p. 508; Fol. Dict. II. 345; Mor. 14015.

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he had as heir to his father, under the old investitures ; and Alexander's assignee, who could only stand in his place, must be liable to perform the contract, which Alexander himself was bound to make good to the heirs of provision.

2. By the law of Scotland, no deed by a person pretending to be heir can be effectual, unless his titles shall have undergone the examination of an inquest, and been approved of by them on oath. Unless that sanction is obtained, he has no power over the estate, and his title is incomplete. Alexander's title, however, as heir of provision under the marriage contract, never was completed, nor could he consequently make an effectual conveyance.

That he never did establish a right to the procuratory of resignation, is clear from the interlocutor of the 31st July 1738, (not appealed from,) authorizing the appellant to serve as heir of provision to the procuratory.

Pleaded for the Respondent:—1. Marriage settlements, without restrictive and irritant clauses, are not of the nature of entails, and are binding only on the contracting parties, and that merely in favour of the *persona prædilecta*, who in the present case were the sons of the marriage : but as soon as the first heir takes the estate, or any substitute takes it upon his failure, the person so taking holds it *tanquam optimum maximum*, and can dispose of it gratuitously ; the substitution in favour of the next heirs being of the nature of a simple destination, and therefore alterable at pleasure.

In the event that has happened, the only obligation upon the heir male either of the first or of the second marriage, in favour of the daughters of

the first marriage, was as to the payment of the portions provided to them, which they have received.

2. Where any person has two or more unlimited titles to the same estate, he may use and establish the rights in his own person by any of those titles he pleases, and no succeeding heir can quarrel his predecessors having made up his title in that manner, especially in such a case as the present, where there was no proviso by the marriage contract, that the heir of the marriage should possess the estate under that title only; and therefore, though neither of the sons were served and retoured heir of provision under the contract, yet as they were served heirs male in special to their father, and infest in the estate, they acquired as absolute a property by that form of title, as if they had made up their titles as heirs of provision.

After hearing counsel, "it is ordered and ad- Judgment,
"judged, &c. that the several interlocutors com- May 31, 1742.
"plained of be affirmed."

For Appellant, *R. Craigie, W. Murray, Ch. Erskine.*

For Respondent, *Jas. Erskine, Al. Forrester.*

1742.

EDGAR

•

MAXWELL.

1743.

AINSLIE <i>v.</i> ARBUTHNOT, &c.	GEORGE AINSLIE, ARBUTHNOT & Co.,	- - - - - - - - - -	<i>Appellant;</i> <i>Respondents.</i>
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7th February 1743.

FACTOR—BILL OF EXCHANGE.—A factor taking bills in his own name, from his constituent's debtor, without giving notice thereof to his constituent, found liable for the loss arising from the bankruptcy of the debtor.

[Kilk. p. 182. Fol. Dict. III. 202. Elchies, *voce* Bill of Exchange, No. 20. Mor. Dict. 4065.]

No. 66. **ARBUTHNOT** and Co. were employed by Ainslie, merchant at Bourdeaux, to receive and collect the rents of an estate which he had purchased near Edinburgh.

They agreed in 1731 with one Cave, a brewer, to let him have the barley on the estate for two years at a certain rate per boll, and that the price should be paid at Martinmas in each year after the delivery of the barley; and they immediately gave Ainslie notice of this agreement by letter. At the term of payment, however, instead of the money, Arbuthnot and Company took Cave's bills or promissory notes, bearing interest, to the company. No intimation of this arrangement was given to Ainslie; nor did he appear to have received the interest thus stipulated when he received the price of the barley at the settlement of his account with his factors in 1731.

Arbuthnot and Co. continued to deal with Cave, upon the same terms as formerly, until Cave's bankruptcy in January 1735; but they did not give Ainslie notice of the nature of these terms by letter, nor did these appear from their accounts. Ainslie

then brought an action of count and reckoning against Arbuthnot and Co., and insisted that they were accountable to him for all the sums contained in the bills, and must suffer the loss occasioned by Cave's bankruptcy. The defenders objected that the bills had been taken with a view of placing so much of the appellant's money out at interest, which otherwise would have yielded him no profit. The pursuer answered that he had never authorized the transaction; that it could not have been intended for his advantage, he never having received notice of it either by letter or in his accounts; and that the interest never having been paid to him, but having, in regard to some of the bills at least, gone into the pockets of the defenders, the loss ought to fall upon them.

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 v.
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 &c.

The Lord Ordinary (Elchies) reported the case to the Court upon informations; upon advising which, their Lordships found, (7th June 1739,) 'That Arbuthnot and Co. having taken bills in their own names from Joseph Cave, and having given up the receipts given by Cave to the tenants, without making entry in their books, or taking any other document that these bills were for the behoof of George Ainslie, and without giving any notice to George Ainslie that they had taken these bills in their own name for his behoof,—that the bills so taken were upon the proper risk of Arbuthnot and Co.,' &c.

Upon advising a reclaiming petition, however, with answers, the Court (July 14, 1739) altered this interlocutor, and found, 'That in this case there is no fault or neglect chargeable on the part of the petitioners, Arbuthnot and Co., sufficient to transfer the risk of the bills in question

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&c.

‘ upon them ; but that the contents of these bills,
‘ in so far as composed from Joseph Cave’s ac-
‘ counts in the company’s books, and taken for the
‘ pursuer’s barley therein stated as sold and deli-
‘ vered to Joseph Cave, do still remain a debt up-
‘ on Mr. Ainslie, the pursuer’s proper risk ; and
‘ therefore repelled the objection proposed for the
‘ pursuer against stating such part of these bills to
‘ the company’s credit, and remitted to the Lord
‘ Ordinary to proceed accordingly.’ They after-
wards adhered.

Entered,
23d Nov. 1742.

The appeal was brought from these interlocu-
tors of the 14th of July and 18th of December,
1739.

Judgment,
7th Feb. 1743.

After hearing counsel, “ it is ordered and ad-
“ judged &c. that the said interlocutor of 14th
“ July 1739, and the interlocutor of the 18th De-
“ cember following, adhering thereto, be, and the
“ same are hereby reversed ; and that in the inter-
“ locutor of the 7th June 1739, in the appeal men-
“ tioned, these words (‘ without making entry in
‘ their books, or taking any other document that
‘ these bills were for the behoof of George Ain-
‘ slie, and’) be omitted ; and that the said interlocu-
“ tor with this omission be, and the same is hereby
“ affirmed.”

For Appellant, *G. Clark, C. Erskine.*

For Respondents, *R. Craigie, W. Murray.*

Kilkerran says that the interlocutor 14th July “ was pronounced,
“ not upon the general point, but upon the *species facti*, it being
“ thought to appear from a book called a Bill Book, that there was
“ evidence of such posting as the former interlocutor had supposed
“ necessary ; but this last judgment was reversed upon an appeal, the
“ House of Peers having no regard to a bill-book, as not *nomen juris*.”

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CAMPBELL
v.
CAMPBELL
AND HUSBAND.

WILLIAM CAMPBELL, - - - *Appellant* ;
MARGARET CAMPBELL and HUSBAND, *Respondents*.

17th February, 1743.

SUBSTITUTE AND CONDITIONAL INSTITUTE. — CLAUSE. —

A destination of personal property to A ; and in *case of his decease* to B, found to be a proper substitution, which subsisted although the institute survived the testator.

Found that this substitution, although alterable by the institute, was not affected by a *previous* general disposition of all that might belong to him at his death.

[*Kames, Rem. Dec.* pp. 25, 26. *Kilk.* p. 321.—*Elchies*, No. 7, *see* Legacy. *Fol. Dict.* iv. 302. *Mor. Dict.* 14855.]

JOHN Campbell executed a general disposition of No. 67. the whole effects, debts, sums of money, &c. which might belong to him at the time of his death, in favour of William, his eldest son, with the burden of provisions to his other children, Matthew, Daniel, and Margaret. Daniel made his will at sea, on a voyage from the East Indies, in May 1739, bequeathing all his money and effects to “ John “ Campbell, his father ; and, in case of John’s de- “ cease, to Margaret, his beloved sister.” Daniel died at sea the same month, and in June following John the father died also, without having heard of Daniel’s death, or of the will which had been made by him.

A competition then arose as to Daniel’s suc-

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cession between William and his sister Margaret. William brought an action against her and her husband, concluding to have it found that the substitution in favour of Margaret was, in effect, but a conditional institution. It was argued that substitutions, with regard to moveable effects, were considered merely as the vulgar substitutions of the Roman law, *si heres non erit*, according to which the substitution did not take effect if the institute survived the testator; and, as in the present case, John survived his son the testator, the substitution in favour of Margaret became void; and 2dly, That Daniel's effects being vested in John by his survivance, were carried by his previous general settlement in favour of the pursuer.

Even supposing the settlement executed by Daniel to have contained a proper substitution, it was at all events merely a simple destination, which, even in the case of lands, and still more in the case of personal property, was alterable by John the institute; and it was effectually altered by the settlement previously executed by him, by which he conveyed, in express terms, in favour of the pursuer, all the effects that should belong to him at the time of his death.

It was answered, 1, That this subtlety of the Roman law upon the doctrine of conditional institution and substitution was founded upon the supposed impossibility of a man naming an heir to his heir, or, in other words, of making a proper substitution. But the doctrines of our law upon this subject are very different, and the rule is, that any express substitution excludes the legal succession; 2dly, All that it can be supposed that John intended to convey by his general disposition, were his

proper effects, which, but for that settlement, would have descended to his heirs *ab intestato*. There is nothing in that deed or in the circumstances of the parties, from which it can be presumed that the father intended to void the substitution in Daniel's will, which indeed was not in existence at the time; and it cannot be maintained that Daniel's effects must *ex necessitate* be carried by the mere force of the words in the father's settlement.

The Lords, upon the report of the Lord Ordinary, (13th June 1740,) found ' That the substitution in favour of the defender Margaret in her brother Daniel's will does subsist, notwithstanding the institute John Campbell his father did survive the said testator; and, found, That the general disposition in the year 1734 granted by the said John Campbell to the pursuer several years before the said will, does not evacuate the said substitution; but that the same does still subsist.'

The Court, upon advising a petition and answers, and, after a hearing in presence, adhered, (12th November 1740.)

The appeal was brought from these interlocutors of the 13th June and 12th November 1740.

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CAMPBELL
AND HUSBAND.

After hearing counsel, " it is ordered and adjudged, &c. that the petition and appeal be, and are hereby dismissed; and that the interlocutors complained of be affirmed."

Entered
Nov. 30,
1742.
Judgment,
February 17,
1743.

For Appellant, *William Noel, A. Hume Campbell.*

For Respondents, *R. Craigie, W. Murray.*

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HUME CAMP-

BELL

v.

HUME, &c.

The Honourable ALEXANDER HUME CAMPBELL,	} <i>Appellants;</i>
DAVID HUME, Esq. Sheriff-Depute of Berwickshire, and JOHN SIN- CLAIR,	
	} <i>Respondents.</i>

1st March 1743.

MEMBER OF PARLIAMENT.—ACT 7. GEO. II. c. 16.—No action lies upon this statute against the Sheriff, for making a double return; but action lies against the clerk chosen by the minority of the meeting, who secede from the rest, for returning to the Sheriff the candidate elected by that minority.

[Dict. III. 438.—Elchies, No. 13, *voce* Memb. of Parl. and No. 3, *voce* Appeal.]

No. 68. By the above act, it is provided, that ‘ if the clerk
‘ of any meeting of freeholders, for the election of
‘ a Commissioner to serve in Parliament for any
‘ shire in Scotland, shall *wilfully return* to the
‘ Sheriff, any other person than him who is duly
‘ elected, or if any person, pretending to be clerk,
‘ not duly elected, shall presume to act as clerk,
‘ and shall make such a return, the party offend-
‘ ing shall forfeit L.500, to be recovered by the
‘ candidate to whose prejudice such false return
‘ is made.’

It is also provided, ‘ that any Sheriff who *shall*
‘ *wilfully* annex to the writ any *false or undue*
‘ *return* shall forfeit L.500.’

At the meeting of the freeholders of Berwickshire in May 1741, for electing a member of Parliament for the county, the candidates were Mr. Hume Campbell (the appellant,) and Sir John Sinclair. Considerable divisions took place—the particulars of which it is unnecessary to investigate. The result was, that the meeting was split into two parties; that a preses and clerk were chosen by each, and that two returns were made to the Sheriff, one by Sinclair (as clerk to the minor division of the meeting) in favour of Sir John Sinclair, as the person duly elected Commissioner for the county—the other by another person as clerk of the majority in favour of Mr. Hume Campbell.

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Mr. Hume, the Sheriff, annexed both returns to the writ.

Upon this the appellant preferred a petition and complaint, both against the Sheriff and against Sinclair, founded upon the above act, and concluding against each for the penalty of L.500.

The Court, upon advising the petition and complaint, found (Dec. 9, 1741) that in the case of “*double returns*, no action lies against the Sheriff upon the statute of the 7th of the King, intituled “an act for the better regulating elections, &c.; and “found that there is no sufficient evidence for proving the complaint against Sinclair, the clerk, and “that neither his assuming the office of clerk, nor “his returning Sir John Sinclair to the Sheriff, “as the person elected by the meeting in which he “acted as clerk, does subject him to the penalty “provided by the said statute for a wilful false return, and therefore *assoilzied*” both defenders from the whole conclusions of the libel.

The appeal was brought from this interlocutor of 9th Dec. 1741.

Entered
30th Nov.
1742.

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v.
HUME, &c.

Pleaded for the Appellant:—A false double return is as much against law and justice, and as prejudicial to the candidate duly elected—as a false single return, and must therefore be considered an undue return within the words and meaning of the statute; and this statute being a remedial law, calculated for the preservation of the constitution, and the rights of the freeholders, ought to be construed in the manner most proper to attain these ends.

Against Sinclair (the clerk) it was maintained to be clear from the evidence, that, though not chosen by the meeting, he did presume to act as clerk, and did wilfully return a person as duly elected who was not elected by the majority of the freeholders—and, that being present during the whole proceedings, he must have known, not only that he himself had not been duly elected to the office of clerk, but likewise that the appellant was the person duly elected by the majority, commissioner for the county.

Pleaded for the Respondent, (Mr. Hume:)—By the words of the statute, no person complaining of a return made to his prejudice, is entitled to recover any penalty from the Sheriff, except the person entitled to be returned, and not returned. But where there is a double return, and the Sheriff, on account of the difficulty of the case, submits the whole to the judgment of the House of Commons, to decide upon the right of the parties, neither of them can say that he is not returned, or entitled on that ground to maintain an action against the Sheriff.

If the words of the statute do not extend to double returns, no rule of construction ought to carry the penalty further than the words warrant. Cases omitted in framing penal statutes, ought not to

be brought within them by construction, on the ground that though not within the words, they were within the plain meaning of the legislature: such statutes are always strictly interpreted.

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Pleaded for the Respondent, (Sinclair:)—There is no evidence that the respondent had wilfully made a false return, that is, contrary to his own knowledge and conviction. He acted as clerk, because he thought he had been so elected, and the return made by him was that which, if his own election had been good, ought to have been made.

After hearing counsel, “it is ordered and adjudged, “ &c. that so much of the said interlocutor, whereby “ the Lords of Session found, ‘ that in the case of ‘ double returns, no action lies against the Sheriff ‘ upon the statute of the 7th of the King, intituled ‘ an act for the better regulating the elections, &c. ‘ and therefore assoilzied the said David Hume ‘ the Sheriff, from the petition and complaint ‘ mentioned in the said appeal, whole conclusions ‘ thereof, and penalties craved thereby, and de- ‘ cerned and declared him quit thereof, and free ‘ therefrom, now and in all time coming,’ be, and “ the same is hereby affirmed; and that so much of “ the said interlocutor, whereby the Lords of Ses- “ sion found, ‘ that there is no sufficient evidence ‘ for proving the complaint against John Sinclair, ‘ the clerk, and that neither the assuming the of- ‘ fice of clerk, nor his returning Sir John Sinclair ‘ to the Sheriff, as the person elected by the meet- ‘ ing, in which he acted as clerk, does subject him ‘ to the penalty provided by the said statute for a ‘ wilful false return; and therefore assoilzied the said ‘ John Sinclair, the clerk, from the aforesaid petition, ‘ and complaint, whole conclusions thereof, and pe-

Judgment,
1st March,
1743.

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'nalties craved thereby, and decerned and declared
 'him quit thereof, and free therefrom, now and
 'in all time coming,' be, and the same is hereby
 "reversed; and it is hereby declared, that the re-
 "spondent, John Sinclair, is guilty of wilfully mak-
 "ing a false return to the Sheriff of the shire of Ber-
 "wick, contrary to the said act of Parliament, and is
 "liable to the penalty thereby inflicted; and it is
 "therefore ordained and adjudged, that the said
 "John Sinclair do forfeit and pay to the appel-
 "lant, the sum of five hundred pounds sterling,
 "according to the said act of Parliament: And
 "it is hereby further ordered, that the Court of
 "Session do give all the necessary and proper di-
 "rections for carrying this judgment into execu-
 "tion."

For Appellant, *Ro. Craigie, Wm. Murray,*
Alex. Forrester.

For Respondents, *Fr. Chute, C. Erskine.*

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EARL OF
SUTHERLAND
v.
ROSS, &c.

WILLIAM, Earl of SUTHERLAND, - *Appellant*;
ROSS, ANDERSON, *et alii*, - - - *Respondents*.

25th March, 1743.

SUPERIOR AND VASSAL.—FORFEITURE.—RECOGNITION.—PERSONAL OBJECTION.—ACT 1. Geo. I. c. 20.—ACT 1. Geo. I. c. 50.—ACT 5. Geo. I. c. 20.—A vassal having incurred recognition by alienating part of his lands, and the superior, upon his subsequent forfeiture, having, in his exceptions taken before the Court of Session against the survey made by the trustees, founded his claim solely upon 1st Geo. I. c. 20, and obtained decree, it was found not competent for him thereafter to insist in a declarator of recognition on the ground of the alienation.

[Elchies, voce Forfeiture, No. .]

By the act 1 Geo. I. c. 20, entitled, “ An No. 69.
“ act for encouraging superiors, vassals, &c. in
“ Scotland, who shall continue in their duty to
“ his Majesty,” it was enacted, ‘ That if any
‘ subject of Great Britain holding lands of a sub-
‘ ject superior in Scotland, had been, or should be
‘ guilty of high treason, his lands, &c. should re-
‘ cognosce, and return into the hands of his supe-
‘ rior, and the property be consolidated with the
‘ superiority, so as such superior did diligence
‘ really and without collusion, for attaining posses-
‘ sion of such lands within six months from the at-

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‘ tainder of the vassal.’ But it is provided, “ That
 “ no attainder should exclude the right or dili-
 “ gence of any creditor remaining peaceable and
 “ dutiful, for security of payment of any just debt
 “ contracted before the treason committed.”

By the 13th sect. of the 1st Geo. I. c. 50, (an act for vesting in his Majesty for the use of the public, all the estates of persons attainted for high treason,) “ All persons having any right or claim, “ &c. whatsoever in law or equity, in or to, &c. “ such estates,” are directed to enter the claim before the commissioners in the manner directed, and in default thereof, every such right, claim, &c. shall be held null and void, &c. and the claimant is directed to express particularly the nature of his right or claim.

By the 5th Geo. I. c. 20, All persons claiming any right to an estate, which has been seized by the trustees, &c. or claiming such estate as superior or vassal, by virtue of the act for encouraging superiors, are required to present to the Court of Session their exceptions against the possession taken by the trustees, together with the grounds of their right, &c. within the term prescribed.

The present question, as affected by these acts, arose out of the following circumstances: Lord Duffus (the vassal in the lands of Skelbo,) was attainted of high treason by act of Parliament, and the estate was surveyed by the trustees as forfeited to the crown.

A claim was then given in for John, Earl of Sutherland, the superior of the lands, founded 1st upon the act of the 1st Geo. I. c. 20, “ for encou-

raging superiors," and setting forth that he had brought his action within the six months after Lord Duffus' attainder; and 2d, Upon an act of recognition alleged to have been committed by Lord Duffus previous to his attainder, in alienating the one half of his lands without consent of his superior, and bearing that a summons of declarator of recognition, reduction, &c. had already been instituted upon this ground against the vassal.

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No determination, however, was pronounced by the trustees, and afterwards in pursuance of the 3d act above recited, (5th Geo. I. ch. 20,) the Earl of Sutherland, and William Lord Strathnaver, his son, presented to the Court of Session their exceptions against the survey made of the lands of Skelbo by the trustees, and claimed the same under the act of the 1st Geo. I. ch. 20. "for encouraging superiors." The Court of Session, (10 Sept. 1719,) "Sustained the above exceptions, and declared the said Earl of Sutherland and his son had right to the full property and possession of the lands therein mentioned, with the burden always of the payment of the debts affecting the same."

After this, some of the creditors gave in claims in virtue of this reservation, and were found entitled to payment of their debts; and the appellant then instituted (in 1736) an action of declarator of recognition, on the ground (already mentioned) that Lord Duffus had, previously to his attainder, alienated more than half of his estate without the consent of his superior.* In this action the creditors

* The effect of a decree of recognition would have been to have cut out the creditors from their claim of debt, whereas under the act "*for encouraging superiors*," &c. the estate recognoscing to the superior was burdened with the payment of lawful debts.

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of Lord Duffus made appearance, and objected that the appellant's father and grandfather having, in place of making up any title to the said estate by virtue of the said recognition, claimed it, (in their exceptions to the Court of Session,) as forfeited to them under the act "for encouraging superiors," and having obtained a decree, declaring the estate to belong to them, in respect of the rebellion of their vassal, they thereby acknowledged a right and property in their vassal at the time of the rebellion, which was a waiver of any claim of recognition,—that the Earl of Sutherland ought,—in his exceptions to the Court of Session,—to have claimed the estate upon his casualty of recognition in the terms of the 5th Geo. I. c. 20, and having failed to do so, his claim of recognition was now barred.

It was answered, that a claim had been duly entered before the trustees, both under the act "for encouraging superiors," and upon the recognition, upon which no decision having been pronounced, the appellant was now at liberty to insist in his declarator of recognition.

The Court, by their first interlocutor, (5th Feb. 1740,) found 'That the appellant, the Earl of Sutherland, having presented a claim before the commissioners of inquiry, upon his right of recognition, as well as upon the act 1 Geo. I. c. 20, for encouraging superiors, &c. and the commissioners having given no judgment on the same,—it was competent to the said Earl to insist now in the process of declarator of recognition, and therefore repelled the objections.'

In a reclaiming petition it was pleaded, that abstracting from the act of the 5th Geo. I. c. 20, and

supposing it unnecessary to have entered an exception before the Court of Session on the claim of recognition, yet no sufficient claim had been entered with the trustees, upon the title of recognition now set up, in terms of the vesting act of the 1st Geo. I. c. 30, sect. 13, and that the claim thus presented on that ground was not a proper claim, nor agreeable to the directions of the statute, being destitute of many of the forms and requisites prescribed.

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It was answered, *inter alia*, that even supposing the claim to have been imperfectly brought, it was not incumbent upon the Earl to enter any claim before the trustees on the casualty of recognition, in order to preserve his right.

Upon advising these pleadings, and after a hearing in presence, the Court (9 July, 1740) found, "That for preserving the pursuer's casualty of recognition, it was necessary for him to enter a claim thereof before the commissioners appointed for enquiring into forfeited estates, and that notwithstanding of his right as superior of the lands, subject to the recognition by the act of the 1st Geo. I. 'for encouraging superiors,'" &c.; and found, "That no sufficient claim of the said recognition was by him entered before the commissioners, and therefore that he was not entitled to insist in this recognition." Their Lordships adhered (24 June, 1741.)

A petition was then presented by the creditors, stating that the court had only determined upon some of the objections made by them to the action at the instance of Lord Sutherland, and that others were still undisposed of. They insisted, therefore, 1st, That a recognition could not be declared after

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a forfeiture, as this would expose the crown to collusion between the superior and vassal. 2dly, That if there had been any room for the recognition, Lord Sutherland was now barred from claiming any right under it, by his having presented his exceptions to the Court of Session, against the survey made by the trustees of the lands of Skelbo, and having founded his claim entirely upon the act "for encouraging superiors."

Answers were given in to this petition, but before the same were advised,

Entered
 11 Dec.
 1741.

An appeal was brought by Lord Sutherland from the interlocutors of 9 July, 1740; and 24 June, 1741.

Pleaded for the Appellant :—It was not by any means necessary for the appellant, for the preservation of his right of recognition, to enter any claim before the commissioners. The clause of the act of the 1st Geo. I. c. 50, requiring the presentation of claims under forfeiture, relates solely to estates vested by that act in his Majesty for the use of the public, but by the previous act "for encouraging superiors" the lands of persons attainted, held of subject superiors, were declared to recognise, and return to such superior, as, without collusion, and within the time limited, obtained possession of them; and as the subsequent act "for vesting forfeited estates in his Majesty, for the use of the public," could not be intended to take away such estates from those to whom they had been granted by the previous statute, the estate in question could never have been vested in his Majesty, so that the claim required to be presented by this act was not necessary. Indeed there is an

express provision in the latter statute, that the right before granted to superiors should not be taken away, or even altered.

But if such a claim had been necessary, there was one presented to the commissioners, which made express mention of the recognition.

Pleaded for the Respondents :—It was essential for the preservation of the right of recognition, that a claim should have been entered, because by the act of the 1st Geo. I. c. 50, all estates belonging to attainted persons were vested in his Majesty for the use of the public, and this without any exception, so as to include even those estates which were liable to be claimed by the superiors, and as the interest granted to superiors by the previous act “for encouraging superiors” was not simple or absolute, but conditional, and depending upon a future potestative condition,—viz. the performance of the statutory requisites, with which superiors might or might not comply,—the estate of the forfeiting vassal must, in the mean time, be held to have vested in the crown, until the superior has complied with the terms required by the statute, to divest the crown of the estate, and to vest it in himself.

By the failure, therefore, to present a proper claim before the commissioners, and by the appellant’s having, in his exceptions to the Court of Session, founded his demand solely upon the above act, without taking any notice of his claim arising from the alleged recognition, he must be held to have renounced this claim; for although the same person may have different titles to the same estate, yet as the statute expressly declares all titles not claimed

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before the commissioners to be null and void, and the estates liable thereto to be from thenceforth freed and discharged, it follows that a person claiming under one title, and not claiming by virtue of any other, as effectually extinguishes that title on which he neglects to claim, as if the two titles had been in different persons, one of whom had omitted to make any claim, according to the maxim, *Quamdiu duo jura concurrunt in uno*.

If there is any deficiency in point of law in the appellant's title, he can have no pretence to indulgence from a court of equity, the whole purpose of the present attempt being to deprive onerous creditors of the payment of their just debts.

Judgment,
25 March,
1743.

After hearing counsel, 'it is ordered and adjudged, &c. that so much of the said interlocutor, whereby the Lords of Session found, "That no sufficient claim of the recognition in question was entered before the commissioners for enquiring into the forfeited estates," be, and the same is hereby reversed; and that in the said interlocutor, after the words ("casualty of recognition") these words be inserted, ("incurred prior to the treason committed by the vassal;") and it is hereby declared, that the appellant's grandfather and father having claimed the estate in question, by their exceptions presented to the Court of Session, as forfeited to them under the act of the first year of his late Majesty, for encouraging superiors, &c. and having, in the year 1719, obtained a decree of the said court, declaring the estate to belong to them, by virtue of the said act, in respect of the rebellion of their vassal, with the burden always of a proportion of the debts affecting the said estates, the same

‘ was a waiver or renunciation of any recognition
 ‘ prior to the treason so committed as aforesaid, and
 ‘ that the appellant is bound thereby. And it is fur-
 ‘ ther ordered and adjudged, that the residue of the
 ‘ said interlocutors, with the alterations or varia-
 ‘ tions before mentioned, be, and the same is here-
 ‘ by affirmed.

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v.
 PROVAN.

For Appellant, *Ro. Craigie, C. Erskine.*

For Respondents, *Will. Hamilton.*

PATRICK CALDER of Redford, and } *Appellants ;*
 WILLIAM ANDERSON, Surgeon, }
 MARY PROVAN, - - - *Respondent.*

12 January, 1744.

PACTUM ILLICITUM.—BILL OF EXCHANGE.—Action sustained
 upon a gratuitous bill which had been granted by a man in
 security of a promise of marriage, the marriage not having
 taken place.

COSTS.—£40, given to Respondent.

[*Elchies* voce Bill of Exchange, No. 25; Rem. Dec. II. No. 30;
 C. Home, No. 193; Mor. Dict. 9511.]

MARY PROVAN raised an action against Calder and No. 70.
 Anderson, concluding for restitution and payment
 of a bill for L.100, which had been granted to her

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by the former, on her agreeing to marry him, and which she had deposited in the hands of Anderson. Anderson acknowledged that the bill had been lodged with him, and that he had given it to Calder. It was further stated in defence to the action, that the bill was gratuitous, and at any rate that it was granted in a drunken frolic, and never intended to be obligatory, as might be inferred from the circumstance of its having been returned to Calder through the hands of Anderson.

The Lord Ordinary allowed a joint proof, from which it appeared, that Calder, being in a public house in company with some other persons, and considerably intoxicated, conversed much with Mary Provan, (the servant maid,) expressing a great fondness for her; that in the course of the evening they retired together into another apartment, where they remained shut up for about an hour, (but it was not pretended that any unlawful intercourse passed between them); that Provan afterwards came into the room where the company were, and shewed them a paper, which she said was given her by Calder for promising to marry him, or (according to one witness) as a proof of the sincerity of his intention to marry her; but Anderson, and another person, upon examining it, told her it was a bad bill; and then she carried it back to Calder, who wrote and delivered to her another bill, which they told her was a good bill, for L.100, payable at Whitsunday then next; that at Anderson's desire she wrote her name upon the back of it, and left it in his hands upon his promising to be answerable for it, or to pay her the L.100, &c.

The Lord Ordinary (8th July, 1741) found
 “ that there is no evidence that any sinister me-
 “ thod was used by the pursuer to obtain the bill in
 “ debate, nor that the same was granted in the way
 “ of a joke or drunken frolic ; and finds it proven,
 “ that the same having been granted after a long
 “ conversation between the pursuer and Calder,
 “ and after a former bill, which was objected to as
 “ void, was, as is presumed, retired, and the bill
 “ now pursued on granted in place thereof, the bill
 “ is to be presumed to be the result of a lawful
 “ transaction between the pursuer and defender
 “ Calder ; and finds this is supported by the decla-
 “ ration the pursuer made of the cause of granting
 “ the bill, as mentioned in the evidence adduced,
 “ and therefore finds that the same was binding up-
 “ on him, the said Calder ; and finds it proven that
 “ the defender Anderson did receive the bill upon
 “ the sole account of the pursuer, and that he did
 “ wrong in delivering the same up to Calder ; and
 “ therefore repels the defence that the bill was gra-
 “ tuitous, and finds the defenders conjunctly and
 “ severally liable for the sum of L.100 Sterling, and
 “ annual rent thereof, from the term of payment.”

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This interlocutor was altered by the Court, who sustained the defences, and assoilzied ; but upon advising another reclaiming petition, (23d July, 1721) they again altered, and decerned in favour of the pursuer, and to this judgment they afterwards adhered.

The appeal was brought from the interlocutors of 8 July 1741, 23 and 31 July 1742, and 7 January 1743. Entered, 25 Jan. 1743.

*Pleaded for the Appellants :—*It is apparent from the whole circumstances of the case, that the

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bill was taken without any intention to create a debt upon the appellant, Calder, but as a mere joke against him, who was in liquor at the time; and that it was with the same view that he and the respondent were sent by the company into a separate room, without the suspicion of any unlawful commerce or other transaction which was to pass between them. It is likewise evident that the respondent did not think the bill of any use, as she immediately put it into the hands of the other appellant, instead of preserving it herself, or entrusting it to her own relations in the house.

But supposing the bill to have been obtained by her seriously, still she cannot be entitled to recover upon it in a court of justice. It is admitted that it was given gratuitously; and when it is considered that it was so given by a drunk man to the servant girl in a public house, whom he never saw before, the circumvention must be obvious. That there was any consideration *ex turpi causa*, is not pretended; but if there was, it would only make the respondent's case worse; for all securities obtained by women of that sort, even though deliberately, and from men knowing what they do, are in courts of equity set aside.

Pleaded for the Respondent:—It cannot be held that the bill in question was obtained by any unfair practices on the part of the respondent, whose character was perfectly unblemished. On the contrary, the whole transaction was a scheme on the part of the appellants to inveigle and delude the respondent, whom they have treated in the most fraudulent manner.

Bills granted either in consideration of secret services, or in recompence for a breach of a pro-

mise of marriage, (a reliance on which may have drawn the person to whom it was made into several steps which she would not otherwise have taken,) ought not to be rendered ineffectual, in favour of one who was not only privy to all the most exceptionable parts of the transaction, but confesses himself to have been the contriver of the whole; nor yet in favour of his confederate who, having been likewise privy to the whole design, contrived under pretence of friendship, and upon a promise to be responsible for the value, to get the bill into his own hands.

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After hearing counsel, "it is ordered and adjudged, &c. that the several interlocutors complained of be, and the same are hereby affirmed; and it is further ordered, that the appellants do pay, or cause to be paid to the respondent, the sum of L.40, for her costs in respect of the said appeal."

Judgment,
12 January,
1744.

For Appellants, *R. Craigie, W. Murray.*

For Respondent, *Will. Hamilton, C. Erskine.*

STEWART

GRAHAM, &c. CAPTAIN JOHN STEWART, *alias* COL-TERANE, - - - } *Appellant ;*
WILLIAM GRAHAM, Trustee for AGNES STEWART, *et alii*, - - - } *Respondents.*

10 February, 1744.

MUTUAL CONTRACT.—HUSBAND AND WIFE.—An estate being provided in a marriage contract “to the heirs of the marriage,” the father was found not entitled to settle it by an entail, upon any child, other than the heir of the marriage; and an entail, thus settling it, was reduced as being *contra fidem tabularum nuptialium*.

[Elchies, *voce* Mutual Contract, No. 20.]

No. 71. By marriage contract entered into in 1668 between John Stewart of Phisgill, and Agnes Stewart, the latter disposed her lands of Glenturk, and others, to the said John Stewart, and "the heirs of the marriage," &c.; and, in like manner, John Stewart bound himself to provide all the lands, sums of money, &c. he then had, or might acquire, "to the heirs of the marriage."

John was infest, and his infestment was recorded. Of this marriage there was issue, four sons, David, Robert, William, and James; and four daughters, the eldest of whom were named Agnes and Elizabeth. David predeceased his father, without issue. Robert also predeceased his father, but left a daughter, Agnes.

On 6th June, 1719, John executed an entail of his whole estate, (including his wife's property,) whereby he disposed it to himself, and the heirs

male of his body; whom failing, to the heirs female of his body, and the heirs male of their bodies; whom failing, to such persons as he should name in *lecto*; whom failing, to his heirs male whatsoever, &c.; and he expressly excluded Agnes (the daughter of his son Robert) from the succession.

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The entail was registered, a charter was expedited, and infeftment taken; and upon the father's death, in 1720, William, the third son, was served heir of tailzie to him, and was infeft. He died without issue, and his youngest brother having predeceased him, Agnes, the eldest daughter of the entailer, took up the estate as heir of entail.

Upon her death, without issue, in 1732, the appellant (being the eldest son of Elizabeth, the second daughter,) was served heir of entail to her.

By this time Agnes, the daughter of Robert, and heir of line of the marriage, was of age, and was married; and in order to try the right of the parties to the estate, she and her husband granted a bond in trust to Mr. Graham, the respondent, for L.7000, upon which he charged Agnes to enter in special as heir of line and of provision to her grandfather, and obtained decree of adjudication, in virtue of which he brought an action of reduction and improbation, to set aside the entail, 1719, as being *contra fidem tabularum nuptialium*.

The Lords (5 January 1743,) upon the report of the Lord Ordinary, (after repelling an objection to the title,) found, "that John Stewart, the maker of the entail, could not settle the estate provided in the contract of marriage to the heirs of the marriage, so as to prefer his daughter Elizabeth, and her issue, to Agnes Stewart, the heir of line

1744. "of the marriage," and they, therefore, reduced
 STEWART the entail, &c.
 v. Thereafter their Lordships adhered, (9th June
 GRAHAM, &c. 1733, and found that the "entail was *contra fidem*
tabularum nuptialium."

Entered
 1 Dec. 1743.

The appeal was brought from these interlocutors of 5th January and 9th June 1743, and others in the cause.

Pleaded for the Appellant:—The intention of the parties was only to secure the estates to the children of that marriage in general, but not to point out any particular child. The father had a discretionary power of disposing it to any of the issue, though not strictly the heir of the marriage, and was only restrained from giving it to extraneous heirs.

By the law of Scotland, notwithstanding such a destination in a marriage contract as here occurs, the father continues absolute fiar of the estate. He may sell it, or burden it with debt; and he has also a discretionary power over the succession: for it has been found that he may, for reasonable causes, pass over the eldest son, and give the estate to the second. And in the present case the father had sufficient grounds for exercising that discretion, so as to exclude the granddaughter.

Pleaded for the Respondents:—By the marriage-contract in 1668, the estates are provided to John Stewart, and the "heirs of the marriage." A provision in these terms has received a certain and limited signification in the law of Scotland. The heir of the marriage, under such a provision, is subject to the onerous deeds and debts of the husband; but, in all other respects, such heir is a creditor, and cannot be excluded from the succession

by any gratuitous deed, and he is entitled to reduce and set aside all such as are done to his prejudice.

After hearing counsel, "it is ordered and adjudged, &c. that the said petition and appeal be, and the same is hereby dismissed, and that the several interlocutors complained of be, and the same are hereby affirmed."

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Judgment,
10th Feb.
1744.

For Appellant, *Wm. Noel, C. Erskine.*

For Respondents, *Ro. Craigie, W. Murray.*

COLONEL STRATTON, - - - *Appellant ;*
The MAGISTRATES OF MONTROSE, *Respondents.*

19 March, 1744.

PUBLIC POLICE.—ACT I. GEO. I. c. 5.—PROCESS.—Found that, in an action upon the statute, it is not necessary to summon the whole inhabitants, but only the magistrates.

Found that action upon the statute is only competent where a building has been "demolished, or begun to be demolished," by a mob, with the intention of demolishing it, but not where injury has been done to a house in the prosecution of a different object.

Found by the Court of Session, that "no action lies on the statute for damage arising from the carrying off grain, or other goods, out of any house or outhouse, but only for the damage done by pulling down such house or outhouse." Reversed in the House of Lords.*

[*Elchies voce Public Police*, No. 5. Clk. Home, No. 224. Fol. Dict. IV. 197. Mor. Dict. 18158.]

In the year 1741, a mob in the town of Montrose No. 72. having broken into some granaries belonging to

* This reversal is not noticed in the Reports.

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Colonel Stratton, and otherwise injured the buildings, and having taken a quantity of meal therefrom, he brought an action on the act of the 1st of Geo. I. wherein he called the magistrates and town-council, as representing the community, and concluded against them for damages. The words of the act are, "that, if any persons to the number of
 " twelve or more, being unlawfully, riotously, and
 " tumultuously assembled together, to the disturb-
 " ance of the public peace, at any time after the
 " last of July 1715, and being required and com-
 " manded by one or more Justice, or Justices of
 " the Peace, or by the Sheriff, or Under-Sheriff of
 " the county, or by the mayor or bailiffs, or other
 " head officers, or Justices of the Peace of the city,
 " where such assembly shall be, by proclamation
 " to be made in his Majesty's name, in manner
 " therein directed, to disperse themselves, and
 " peaceably to depart to their own habitations, or
 " their lawful business, shall, to the number of
 " twelve, or more, (notwithstanding such proclama-
 " tion made,) unlawfully, riotously, and tumultu-
 " ously remain, and continue together for the
 " space of one hour after such command or re-
 " quest, made by proclamation; and if persons are
 " so unlawfully, riotously, and tumultuously as-
 " sembled, and shall unlawfully, and with force,
 " demolish, pull down, or begin to demolish and
 " pull down any church, or chapel, or any dwelling-
 " house, barn, stable, or other outhouses; then
 " and in such cases, it is provided and enacted,
 " (*inter alia*,) that the county, stewartry, city, or
 " burgh, (respectively within Scotland) where such
 " disorders happen, and such damages are done, shall
 " be held liable to yield damages to the person or

“ persons injured, or damnified by such demolish-
 “ ing and pulling down, wholly or in part, and
 “ which damage may be recovered by summary
 “ action, at the instance of the party aggrieved,
 “ against the county, stewartry, city, or burgh re-
 “ spectively,” &c.

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There was also a separate conclusion against the magistrates, as being accessory to the riot, or at least having neglected to take proper measures to prevent it.

In defence it was objected, *first*, that no action was, by the statute, competent against the magistrates, as representing the community, and that it ought to have been brought against the burgh itself, *i. e.* the inhabitants thereof, as was the practice in England ; and, *secondly*, that no action lay for any damage sustained by the abstraction of the grain—the damage awarded by the act relating only to such as was sustained by houses being demolished, or begun to be demolished.

A conjunct proof was allowed, after which the Court (28 Jan. 1743) found, “ that, by the act
 “ libelled on, it is the town, or county, within which
 “ such damage as falls under the act is done, that
 “ is liable in reparation of the damage, and there-
 “ fore sustained the objection made to the pursu-
 “ er’s libel, which had not concluded against the
 “ town of Montrose, but against the magistrates
 “ and council, as representing the town ; and found
 “ that no action lies upon the statute for damage
 “ arising from carrying off grain, or other goods,
 “ out of any house, or outhouses, but only for the
 “ damage done by pulling down such house, or
 “ outhouse, in whole or in part, and therefore found

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“ this action, in so far brought on this statute, in-
 “ competent.”

But upon advising a reclaiming petition, with
 answers, their Lordships (24 Feb. 1748) “ repel
 “ the objection against the libel, and find that the
 “ burgh is fitly called, and concluded against, by
 “ calling and concluding against the magistrates
 “ and town-council, as representing the said burgh ;
 “ and adhere to their former interlocutor, finding
 “ that no action lies upon the foresaid act for da-
 “ mages arising from carrying off grain, or other
 “ goods out of any house, or outhouses, but only
 “ for the damage done by pulling down such house,
 “ or outhouse, in whole or in part ; but find that
 “ there is no proof adduced of the extent of any
 “ damage done to the girnle-house in which the
 “ pursuer’s meal was lying,” &c.

Entered
 21st March,
 1748.

The appeal was brought from these and other
 interlocutors in the cause.

*Pleaded for the Appellant :—*By the statute, the
 county, burgh, &c. are rendered liable to the party
 injured for the whole damage sustained by such
 demolishing, or beginning to demolish any house,
 or outhouse ; and it seems strange to confine the
 words of the act to the bare pulling down the
 stones of the building, which may amount to a
 trifle, and to give no damage for gutting the
 house, or carrying away the grain, which may be
 of much greater value. Such could never have
 been the intention of the act. But, in point of
 fact, the granary was in part demolished, and the
 door broken open, to get at the meal, which must
 imply some damage, and that alone entitled the
 appellant to a judgment in his favour.

Pleaded for the Respondents.—The appellant cannot recover any thing upon his action as founded upon the statute; for by this act no relief is given for goods taken out of any house, &c. and the appellant has proved no injury by the demolishing of any building.

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TROSE.

After hearing counsel, “ it is ordered and adjudged, &c. that so much of the interlocutor of the 28th Jan. 1743, whereby the Lords of Session found, ‘ that no action lay upon the act of Parliament, &c. for damage arising from carrying off grain, or other goods, out of any house or outhouse, but only for the damage done by the pulling down such house or outhouse, in whole or in part,’ be, and the same is hereby reversed; and that there be inserted instead thereof these words, (*videlicet*): ‘ That upon the proofs in this cause, it doth not appear that the appellant’s gironel-house was begun to be demolished, or pulled down, within the intent and meaning of the said act of Parliament;’ and it is hereby further ordered, and adjudged, that so much of the interlocutor of the 24th February, whereby the Lords of Session adhered to their former interlocutor, finding, ‘ that no action lies upon the foresaid act for damages arising from carrying off grain, or other goods, out of any house or outhouse, but only for the damage done by pulling down such house or outhouse, in whole or in part;’ but found that there was no proof adduced of the extent of any damage done to the gironel-house in which the appellant’s meal was lying, be, and the same is hereby reversed; and it is also ordered and adjudged, that so much of the several interlocutors as relates to the

Judgment,
19th March,
1744.

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“ costs and expenses of the said appellant be, and
 “ the same is hereby reversed, and that so much of
 “ the said several interlocutors as is not hereby re-
 “ versed, or altered, be, and the same is hereby af-
 “ firmed.”

For Appellant, *W. Murray, Al. Lockhart.*

For Respondents, *R. Craigie, C. Erskine.*

THOMAS WATSON, Trustee for the
 HEIR of HAMILTON of Redhouse } *Appellant ;*
 and CREDITORS, - - -
 THOMAS GLASS, *et alii*, - - - *Respondents.*

5 December, 1744.

TAILZIE.—PROVISION TO HEIRS AND CHILDREN.—CLAUSE.—

Under a clause in an entail binding the heirs male of tailzie and provision, to pay a certain sum “ to the daughters and heirs “ female ” of the entailer,—the entailer’s daughter was found entitled to the provision, although not his heir, a son of his having succeeded to the estate.

Costs.—£50 given to Respondents.

[*Elchies voce* Provision to Heirs, No. 7 ; C. Home, No. 237 ;
 Fol. Dict. III. 124 ; Mor. Dict. 2306.]

No. 73. HAMILTON of Redhouse, by his contract of marriage, was bound to take the titles of his estate to himself and his spouse in liferent, and to the heirs of the marriage in fee. He afterwards executed an entail of his estate in favour of James Hamilton, his son, and the heirs male of his body, whom failing, the other heirs male of his own body, (with

othersubstitutions in favour of collateral heirs male,) provided always that in case there should be daughters and heirs female procreate of his (the entailer's) body, and alive at the time of his death, then the heir male of entail who should succeed by virtue of the entail should be bound to pay to his "said daughters and heirs female, one or more, the sum of 10,000 merks, to be equally divided amongst them."

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The entailer died in 1688, leaving issue, James and Helen. Helen was married to Adam Glass; and the respondents were the issue of the marriage.

James succeeded to the estate, but made up no title. Upon his death, George, his son, succeeded, and contracted considerable debts. Several adjudications were led against the estate, and, among others, by the respondents, who, in the process of ranking and sale which ensued, claimed under the above provision in the entail.

Objected by the trustee, that the said provision was effectual only in favour of such daughter as might have claimed under the legal character of "heir female," which character could not belong to Helen Hamilton, her father having left a son who was the heir of the marriage.

Answered, that the 10,000 merks was a portion absolutely payable to the daughters, if there should be any living at the death of the father, and although a real estate limited to "daughters and heirs female," after a limitation to heirs male of the body, could not vest in a daughter, if she was not also heir, yet such a construction was never put on the same words in a deed relating only to a personal estate or a portion; that the terms of the deed excluded all doubt, for as the personal estate as well as the real was conveyed to "the heirs of

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“tailzie and provision above mentioned,” in virtue whereof the son of the entailer had taken both estates, so the obligation to pay the 10,000 merks, being likewise laid on “the heirs male, tailzie and provision above specified,” must extend to the lineal as well as the collateral heirs male; lastly, that the sum in question was not excessive, amounting to little more than the mother’s marriage portion, whereas, if the objection stated by the trustee were sustained, the daughters would be left entirely unprovided for.

The Lord Ordinary found, (20 July, 1742,) “that, by the conception of the clause in the “tailzie, whereby the heirs were obliged to pay “to the entailer’s daughters and heirs female, “one or more, the sum of 10,000 merks, Helen “Hamilton, the only daughter of the maker of the “entail, was entitled to the provision of 10,000 “merks, in the event which happened, of the entailer’s own son succeeding to the estate, as well “as she would have been entitled to the said provision, if the estate had devolved upon the collateral heirs of entail, and therefore repelled the “objection made against the interest produced “for Thomas Glass and his sisters.” And the Court adhered.

Entered 14
 December,
 1743.
 Amended 3
 February,
 1744.

The appeal was brought from the interlocutors of the 20th July, 1742, and others in the cause.

Pleaded for the Appellant:—As the provision of 10,000 merks was given to the daughters of the marriage under the character of heirs female, and in lieu of their right to the estate under the marriage settlement, none can be entitled to the provision to whom both characters do not apply; and as there was a son of the marriage, the character of heir could not apply to the daughter.

The provision was only intended to take place in the event of the succession of a collateral heir male—upon failure of issue male of the marriage,—to the exclusion of the heir female of the marriage; in which case it was reasonable to make a higher provision for daughters, as a compensation for the loss of their right of succession; and this is commonly done in those marriage contracts, by which, upon failure of male issue, the estate is destined to collateral heirs. The father could not have intended to exhaust the estate in favour of his daughter at the expense of his son and heir.

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Pleaded for the Respondents :—Where portions are provided in marriage-contracts to daughters, or heirs female, the words “heirs female” are considered as synonymous with “daughters.”

By the entail, the heirs male of tailzie and provision are, without any exception, taken bound to pay the provision to the daughters and heirs female, which shows that it was to be payable by a son, as well as by a collateral heir, if there should be any daughters living at the death of the father. Unless so payable, the provision would have been nugatory; for, as it was not a strict entail, it was in the power of the son to have defeated the subsequent substitutions, and of course to have destroyed the possibility of the daughter's obtaining the provision, upon the estate going to a collateral heir.

After hearing counsel, “it is ordered and ad- Judgment,
“judged, &c. that the said petition and appeal be, 5 Dec. 1744.
“and is hereby dismissed the House, and that the
“several interlocutors complained of be, and the
“same are hereby affirmed; and it is further or-
“dered that the appellants do pay, or cause to be

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“ paid to the respondents the sum of L.50 for their
“ costs in respect of the said appeal.”

For Appellant, *A. Hume Campbell, Al. For-*
rester.

For Respondents, *Ro. Craigie, A. Murray.*

DAVID COOPER of Newgrange, - *Appellant*;
ALEXANDER HUNTER of Balskelly, } *Respondents.*
et alii, - - - -

11th December, 1744.

ADJUDICATION.—COUNT AND RECKONING.—A creditor having adjudged the estate of his debtor, and likewise the right to an adjudication which the debtor had led against certain other lands; found that in a question with another adjudger of these last lands, he was bound to account for the rents and profits of the former, into possession of which he had entered in virtue of his degree.

No. 74. THE estate of Newgrange was adjudged by Dr. Lamb of Balskelly.

Lamb's proper estate (of Balskelly) and also the interest which he had thus acquired in the lands of Newgrange, were afterwards adjudged by four of his creditors.

Newgrange was brought to a judicial sale, and was purchased by one Pyper, and by the decrees of ranking and sale the proportion of the price pay-

able by the purchaser to each of the creditors (including Dr. Lamb) was fixed.

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Pyper having afterwards purchased from Janet Lamb and Cramond (two of the adjudging creditors) their adjudications, in so far as they affected Newgrange, sold his whole right to the appellant. The other two adjudications against Lamb's estate and his interest in Newgrange were acquired by the respondent, who having obtained possession of Balskelly in virtue thereof, brought an action of mails and duties against the appellant and the lands of Newgrange for the whole debts on which the adjudications had been led.

In defence, it was pleaded that the respondent had received full satisfaction of his claims against Lamb's estate, by the perception of the profits of the estate of Balskelly, of which he was in possession; and that, at all events, he was bound to account for these before he could insist in his present demand.

Answered,—Even if it were true that the respondents had been thus satisfied, still the purchaser of Newgrange, or the appellant who claims under him, would not be entitled to retain Lamb's share of the price, but must account for it to him, or those standing in his right. The appellant has no pretence to enquire into the management of Balskelly, because the assignations to him by Janet Lamb and Cramond conveyed no more than their interests in the estate of Newgrange. At all events, Newgrange was subject to Lamb's adjudication, as the proportion of the price due to each creditor had been fixed by the decree of ranking and sale, and for this the respondents had an undoubted claim on the estate, which the appellant had no right

1744. to contest, on a suggestion that satisfaction had
 COOPER been received out of Lamb's proper estates of
 v. Balskelly; that question being competent to Lamb's
 HUNTER, &c. representatives only.

The Lord Ordinary, Elchies, (27 November, 1741) " Found that the defender (appellant) having no other title to the lands in question than as deriving right from the purchaser at the judicial sale, and as having paid certain of the creditors as they were there ranked,—in which sale the pursuer was also ranked upon his adjudication against Dr. Lamb, for a proportion of the debts due to the doctor out of the said estate ;— that therefore the pursuer cannot in this process, which is for that part of the price for which he was so ranked, be obliged to count and reckon for his intromission with Dr. Lamb's effects, and that the defender has no sufficient title to object that the pursuer's adjudication against Dr. Lamb was satisfied and paid by such intromission."

Some other points were discussed, which need not be noticed, and the Court, upon the report of the Lord Ordinary, found (14 June, 1743) " that it was not competent to the defender, either as purchaser of Newgrange, or in right of the partial conveyance to Janet Lamb's and Captain Cramond's adjudications, to plead that the pursuer was satisfied, and paid off his debts upon Newgrange by intromissions with the rents or price of Balskelly," &c.

Entered 7th
 Dec. 1743.

The appeal was brought from these interlocutors of the 27th November, 1741, and 14th June, 1743, and others in the cause.

Pleaded for the Appellant :—It would be very unjust that the respondent, if he has already re-

ceived payment of his debt, should yet obtain decree and receive a second payment to the prejudice of the appellant, as purchaser not only of the estate, but of two adjudications upon it, the interest of which must be greater or less as the respondent succeeds or fails in his present attempt. Janet Lamb and Captain Cramond, whose right the appellant has acquired, would, without doubt, have been entitled, previous to the assignation, to have insisted upon this objection to the respondent's demand; and therefore, as in all questions relating to this estate, the appellant, by virtue of the assignations, stands in their place, he has the same title which they would have had to insist upon the objection.

1744.
COOPER
v.
HUNTER, &c.

*Pleaded for the Respondent (Hunter):**—It was a condition of Pyper's purchase of Newgrange at the judicial sale, that he should pay the price to the creditors, as they were preferred by the decree of ranking; and until payment is made to the creditors, according to such preferences, their debts and diligences remain real burdens upon the estate. It is not alleged that the appellant or his author had any payment of that share of the price which corresponds to Dr. Lamb's adjudication, and to which the respondent now has right.

The appellant has no right to Dr. Lamb's separate estate. The assignations obtained from Janet Lamb and Cramond carry their interests only in the estate of Newgrange. Their adjudications were expressly reserved in so far as they might affect any other estate belonging to him; so that

* There are no pleadings for the other respondents, who appear to have been the tenants of the lands.

1744.

 COOPER
 v.
 HUNTER, &c.
 Judgment,
 December 11,
 1744.

the appellant has no title to call the respondent to account for his alleged intromission with the Doctor's separate estate.

After hearing counsel, "it is ordered and adjudged, &c. that so much of the interlocutors complained of, whereby it is found 'That it is not competent to the appellant, in right of the partial conveyances to Janet Lamb's and Captain Cramond's adjudications, to plead that the respondent is satisfied and paid off his debts by intromission with the rents or price of Balskelly;' be and the same is hereby reversed; And it is hereby declared, that it is competent for the appellant in right of the partial conveyances to Janet Lamb's and Captain Cramond's adjudications, to plead that the respondent is satisfied and paid off his debts, by intromissions with the rents or price of Balskelly; and it is hereby farther ordered and adjudged, that the respondent do count and reckon with the appellant for his intromissions with the rent or price of Balskelly, and that the Court of Session do give the proper directions for taking the said account, and for making to all the parties all just allowances therein, and for applying the clear produce of such intromissions towards the satisfaction of the respondent's demands, in such manner as shall be agreeable to justice and the course of the said Court, &c."

For Appellant, *William Murray, C. Erskine.*

For Respondent, *Robert Craigie, A. Hume Campbell.*

1745.

CASSILIS, &c.
v.
HAMILTON,
&c.

The EARL and COUNTESS of CAS-	}	<i>Appellants</i> ;
SILIS, - - - - -		
LORD ARCHIBALD HAMILTON, <i>et</i>	}	<i>Respondents</i> .
<i>alii</i> , - - - - -		
LORD ARCHIBALD HAMILTON, -		<i>Appellant</i> ;
ANNE, COUNTESS OF RUGLEN ;	}	<i>Respondents</i> .
WILLIAM, EARL OF MARCH,		
(her Son); the EARL and COUN-		
TESS OF CASSILIS, <i>et alii</i> , -		
ANNE, COUNTESS OF RUGLEN ;	}	<i>Appellants</i> ;
and WILLIAM, EARL OF MARCH,		
LORD ARCHIBALD HAMILTON, <i>et</i>	}	<i>Respondents</i> .
<i>alii</i> , - - - - -		

19 and 21 March, 1745.

TAILZIE.—CONDITION.—PROVISION TO HEIRS AND CHILDREN.

—A power being given to the heir of entail in possession to burden the lands with provisions to younger children,—how far these provisions are effectual, upon such heir denuding (in virtue of a clause to that effect) in favour of another heir of entail? Found by the Court of Session that such heir of entail was not bound to relieve the lands of the burden. Not determined in the House of Lords.

Found that it was not a fair and proper exercise of the power, whereby the provision was to be effectual only against the heir of entail on whom the estate devolved, and not on the granter and his heirs.

PRESUMPTION.—Circumstances under which the special terms of a bond of provision, directing it in certain events to devolve to certain substitutes, were found to be limited by a general devolving clause in settlements of other family property subsequently executed.

[Elchies, *voce* Provision to Heirs and Children, No. 6.]

WILLIAM, Duke of Hamilton, and Anne, his No. 75.
Duchess, had six sons; James, Earl of Arran,

1745.
CASSILIS, &c.
 v.
HAMILTON,
&c.

Charles, Earl of Selkirk, and Lords John, George, Basil, and Archibald Hamilton. By an entail, containing the usual prohibitory, irritant, and resolutive clauses, executed by the Duke in 1693, the estate of Riccarton was settled upon his third son, Lord John Hamilton, and the heirs male of his body, with other substitutions; and it was provided, that in case Lord John shall succeed to either of his elder brothers, "that then the foresaid whole lands, tithes, and others hereby disposed, shall devolve, fall on, and belong to the next immediate younger son substituted in the foresaid tailzie, and the heirs male of his body," &c.

It is further provided, that the said Lord John and the heirs of entail "shall do no fact nor deed to alter, innovate, or infringe the foresaid tailzie, directly or indirectly, in prejudice of the heirs above mentioned, their succession to the lands aforesaid in all time coming, without prejudice to him or them, to give reasonable jointures to their wives, and also rational provisions to their younger children, as they shall think fit."

Lord John had two daughters, Anne and Susan. Upon the marriage of the former to the Earl of Ruglen, her portion was advanced by her father, without being made a charge upon the estate of Riccarton; and he afterwards granted to Susan an heritable bond of provision over that estate, binding himself and the heirs succeeding to the same to pay the sum of L.3000. Shortly thereafter, Susan was married to the Earl of Cassilis.

Charles, Earl of Selkirk, died in 1738, and Lady Susan was infest upon the bond the day after his death.

By the death of Earl Charles, Lord John succeeded to the estate and earldom of Selkirk, and in consequence, the right to the estate of Riccarton devolved, in terms of the entail, upon his brother Lord Archibald; who thereupon brought an action against Lord John, (then Earl of Selkirk) to have it found that he should not only denude of Riccarton, but that he should also clear the estate from the incumbrance created by the heritable bond in favour of Lady Cassilis.

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CASSILIS, &c.
v.
HAMILTON,
&c.

On the report of the Lord Ordinary, the Court found (22 January, 1742) "that the Earl of Selkirk is bound to disburden the lands of Riccarton of the heritable bond of L.3000, and to relieve Lord Archibald and the lands of Riccarton thereof."*

Lord Selkirk reclaimed, and founded on the clause in the entail above recited; and the Court (12 November, 1742) altered and found "that he is not bound to disburden the entail of Riccarton of the heritable bond of L.3000, and in feftment following thereon in favour of his daughter, now Countess of Cassilis, so far as the said heritable bond shall be found to be a rational provision in favour of the said Countess; and remitted to the Lord Ordinary to proceed accordingly." A debate then took place before the Lord Ordinary upon the point, in how far the said sum was a "rational provision."

* The Court "thought that the condition of the devolving clause having existed by his succession to his brother Selkirk's greater estate, he must denude of Riccarton as he got it; and that the faculty to provide wives and children was only an exception from the prohibition to alter the order of succession." Elchies's Notes, voce Provision to Heirs and Children, No. 6.

1745.
CASSILIS, &c.
 v.
HAMILTON,
 &c.

It appeared that when the action was first raised, the Earl and Countess of Cassilis had (13 July, 1741) granted a back bond to the Earl of Selkirk, whereby, upon the recital, and in implement of certain conditions and obligations contained in their marriage articles, “ they declare that they shall “ have no action against the said John, Earl of Selkirk and Ruglen, or his heirs of line, for warranting or making effectual the said L.3000 “ Sterling, and interest thereof to them, or for “ maintaining them in possession of the said yearly “ annual rent and lands themselves ; and in case, in “ any question with the said heirs of entail, the “ said Earl should be found to have exceeded the “ powers he had, in burdening the said estate with “ the said L.3000, or that the same should be restricted to a lesser sum, and the Earl decerned “ to relieve the estate of so much thereof ; in that “ event they bound themselves to grant a discharge “ and renunciation of so much of the said debt as “ the Earl may be found to have burdened the “ estate with, beyond the powers he had by the “ entail,” &c.

Founding upon this deed, Lord Archibald maintained that the bond of provision had not been intended to be a charge upon the estate at all events, or a charge upon the Earl of Selkirk and his heirs of line, which alone was the sort of burden allowed by the entail ; but was evidently a mere contrivance to charge the estate whenever it should descend to Lord Archibald or the other heirs of entail.

The Earl and Countess of Cassilis now appeared for their interest, and, being made parties, pleaded, that the estate was effectually burdened

by the bond of provision and the infeftments thereon, as well against the Earl of Selkirk and his heirs male, as against the heirs of provision; and that by the agreement entered into by the marriage articles, whereby a benefit was stipulated in favour of Lord Selkirk, in consideration of what he had otherwise given, that burden was not destroyed or intended to be so.

The Court (18 February, 1743) found, “ That the Earl of Selkirk could not, in virtue of the faculty, charge the estate of Riccarton with provisions in favour of his children, to take place only in case of devolution, and not to affect the estate during the time the same remained with his own heirs; and therefore found, that the provision in question, made in favour of the Countess of Cassilis, being qualified by the back bond dated 13 July, 1741, so as not to affect the estate of Riccarton, except in case of the devolution upon Lord Archibald Hamilton, which has now happened, and not to affect the same while the estate remained with the Earl of Selkirk’s lady, the said provisions in favour of the Countess of Cassilis is no effectual charge upon the estate of Riccarton in prejudice of Lord Archibald Hamilton, to whom the estate is now devolved.” And they afterwards adhered.

An appeal was brought by the Earl and Countess of Cassilis,* from the interlocutor of 18 February, 1743, and others in the cause.

A cross appeal was brought by Lord Archibald

1745.
CASSILIS, &c.
v.
HAMILTON,
&c.

Entered 6
February,
1744.

22 March,
1744.

* The Earl of Selkirk was likewise an appellant, but, by an order of 4th December, 1744, was struck out from the appeal, and allowed to be made a respondent.

1745. Hamilton from the interlocutor of 12 November,
 CASSILIS, &c. 1742.

v.
 HAMILTON,
 &c.

Pleaded for the Appellants:—(the Earl and Countess of Cassilis.) Lord Selkirk had, by the entail, a power to charge the estate with such reasonable provisions for his younger children as he should think fit; and this power he exercised in a legal and proper manner, not contingent upon the event of devolution on the other heirs of entail, but absolutely binding upon himself and his own heirs male; so that, unless modified by a subsequent agreement, there can be no doubt that the estate was effectually charged to that extent. This agreement entered into on the marriage of the appellants, cannot have the effect of defeating that charge *in toto*. It was previously a subsisting burden on the estate, perfected by infestment; and the only alteration made at that time, (and subsequently in 1741,) was a stipulation in favour of Lord Selkirk, releasing him personally from the obligation to pay interest; and taking upon themselves the hazard of the suit, touching his power to charge the lands of Riccarton, and his liability now to disburden the same. It cannot be supposed that the provision was not to become effectual in case of the estate devolving to the subsequent heirs of entail, it being the only provision which Lord Selkirk had made for his daughter, and therefore all that she could have claimed, if he had died before her marriage.

Pleaded for the Respondent:—(Lord Archibald Hamilton.) Although by the entail of Riccarton a power was reserved to grant rational provisions to younger children, that was only in the event of the estate descending to the heirs male of

the body of Lord John, and not in that of its devolving to the other heirs of entail. As that was the only estate he had, out of which he could make such provision, the heirs of his body might in that case be bound; but such provision could not bind the other heirs of entail, for by the entail, in the event of Lord John's succeeding to a much greater estate, the "*hail* lands," &c. are to devolve on the next heir therein mentioned, and Lord John is obliged to denude himself of all right to the same; and therefore, as the right which he got was absolute and unincumbent, he ought to give up and denude himself of a right in like manner free from all burdens whatever, especially as in the devolving clause no power is given to him to charge the lands with provisions to his children, with which, had it been intended, would not have been omitted. On these grounds, the interlocutor, 12 November 1742, ought to be reversed.

But whatever might have been Lord Selkirk's power of granting provisions to his younger children, he did not exercise that power in a fair and legal manner. From all the circumstances of the case,—the time of granting the bond, the date of the infeftment thereon, and especially from the stipulations in the marriage settlement, and the relative back bond,—it is evident that the whole was a fraudulent transaction, to render the provision a charge against the estate, only in case of its devolving to the respondent Lord Archibald, and not while in the person of Lord Selkirk, or his heirs. Bonds of provision to younger children are understood to be intended for an immediate fund of subsistence, payable at such terms and in such events as make it reasonable and necessary that younger children should be

1745.

CASSILIS, &c.

v.

HAMILTON,
&c.

1745.
 CASSILIS, &c.
 v.
 HAMILTON,
 &c.

so provided, and therefore the parent binds himself and his heirs in payment of them. But a bond under such restrictions as the present, could not be a proper provision for any child ; which plainly shows the simulate nature of the transaction.

Judgment,
 19 March,
 1745.

After hearing counsel, &c. " it is ordered and " adjudged that the interlocutor complained of in " the said appeal of the said Earl and Countess of " Cassilis, be, and the same are hereby, affirmed. " And it appearing, that the question touching the " disburdening the estate of Riccarton of the sum " of L.3000 and interest, claimed by the appellant, " is now immaterial, and doth not properly come " in judgment in this cause, it is hereby also order- " ed and adjudged, that the interlocutor of the 12th " November, 1742, pronounced thereupon, be, and " the same is hereby, reversed ; but without pre- " judice to that question, when the same shall pro- " perly come in judgment in any other cause," &c.

A separate question arose between the Countess of Ruglen, Earl John's eldest daughter, and her son the Earl of March, on one hand, and Lord Archibald Hamilton and Basil* Hamilton, on the other ; and related to his bonds, one for L.20,000 Scots, and another for L.40,000 Scots, which had been granted to Lord John, (afterwards Lord Selkirk,) both under clauses of devolution.

By a deed executed in March, 1685, William, Duke of Hamilton, assigned an heritable bond for L.20,000 Scots, in favour of his third son, (the said

* Basil died during the dependence of the action, which was afterwards carried on by John Hamilton (as executor creditor confirmed) and Lord Dunbar, and Mary Hamilton (Basil's children) were made parties to it ; but as this does not affect the question, the report is carried on in the name of Basil.

Lord John,) and his heirs male ; whom failing, to his younger brothers successively, with certain other substitutions, and with a provision, “ that in case Lord John should succeed to either of his elder brothers, then the aforesaid sum should descend to the said Lord George, and the rest of the younger brothers successively, &c. and that the said Lord John should be obliged to denude himself thereof in their favours.”

1745.
CASSILIS, &c.
v.
HAMILTON,
&c.

Again, by the entail in 1693, (above mentioned) the estate of Crawford Douglas is conveyed to Charles Earl of Selkirk, (the Duke's second son,) with a provision, “ that in case the said Charles Earl of Selkirk should die without heirs male of his body, so that Lord John, the third son, or any of the younger brothers above mentioned, should happen to succeed to the said lands and barony of Crawford Douglas, then any sums of money which should be due to Lord John, or any of the said younger brothers so succeeding,” &c. should return and fall back to James E. of Arran, (their eldest son,) and his said heirs male, &c. “ and the bonds of provision granted by us to our said sons so succeeding shall be void and extinct, so far as the said sums shall be resting unpaid by the representatives of the family of Hamilton. But in case the sums contained in their said bonds shall happen to be uplifted and paid at the time of their succession to the said lands, in that case their said provisions, or so much thereof as shall have been actually paid, shall not return to the family, but the same, with any other money or estate left by us to our said younger sons, shall fall, appertain, and belong to the said hail other younger brothers of them that shall succeed to

1743. " the aforesaid lands and barony of Crawford Dou-
 CASSILIS, &c. " glas, and their heirs male equally among them."
 v.
 HAMILTON,
 &c.

The estate of Crawford John was also conveyed by the Duchess of Hamilton, with consent of her husband, to Earl Charles, with the same substitutions, and under the same conditions. Shortly afterwards (in Sept. 1693) she granted an heritable bond in favour of Lord John, for L.40,000 Scots, payable at the first term after the decease of the longest liver of her and the Duke, with a provision, " that in case " the said Lord John should happen to succeed to " Charles Earl of Selkirk, his immediate elder bro- " ther, in the lands of Crawford Douglas and Craw- " ford John, then so much of the said sums, there- " by provided, as should be uplifted at the time of " his said succession, should fall and belong to the " heirs of the family of Hamilton, and this bond to " be paid in so far as it extends to sums that should " be resting unuplifted thereof," &c. A power of revocation and alteration is reserved.

Upon the marriage of Lord John in 1694, the Duchess, in the marriage contract, (her husband being dead,) after reciting the terms of the provi- sion to Lord John of the L.40,000 Scots, and the reserved power of alteration, bound and obliged herself, her heirs and executors, to pay to the said Lord John, his heirs and assignees, at the term of Lammas 1695, the said sum of L.40,000 Scots, with interest during the non-payment, and declared that it should belong to him, his heirs and assignees, al- though it should happen to be unpaid at her de- cease, notwithstanding of any clause in the said bond to the contrary.

Upon the succession of Lord John to his elder brother, Lord Charles, in 1739, two actions were

raised against him by his younger brother, Lord Archibald, and by Basil Hamilton, (son of Lord Basil) for having it found (*inter alia*) that he was bound by the devolving clause in the settlement of 1693 to pay to them the sum of L.40,000 Scots received by him on the said bond of provision, and also the sum of L.20,000 Scots, received by him on the assignation by his father to the heritable bond.

1745.
CASSILIS, &c.
v.
HAMILTON,
&c.

The Court (22 January, 1742) “ found, that
“ the defender, John Earl of Selkirk, having suc-
“ ceeded to the estates of Crawford Douglas and
“ Crawford John, is, by the condition in the settle-
“ ment of these estates, bound to make payment
“ to the pursuers, equally between them, of the sum
“ of L.20,000 Scots, contained in the bond assign-
“ ed to him by the disposition from his father in
“ 1685 ; and that, notwithstanding the clause con-
“ tained in the said disposition, which provides,
“ that in case the defender should succeed to any
“ of his elder brothers, the said sum should fall and
“ descend to his immediate younger brother, and
“ the heirs of his body ; and found, that this clause
“ was effectually altered by the condition annexed
“ to the subsequent settlement made by the
“ said Duke and Duchess of Hamilton, of the
“ lands of Crawford John and Crawford Douglas.
“ But found, that the heritable bond of L.40,000
“ being granted to Lord John, his heirs and assign-
“ nees, and reserving to the Duke and Duchess to
“ alter the same, and the said Duchess after the
“ death of the said Duke having consented and be-
“ come a party to the said defender’s contract of
“ marriage, whereby it was agreed that the said
“ sum should be employed in purchasing lands,

1745. " &c. to be taken to the defenders and the heirs of
 CASSILIS, &c. " the marriage ; that thereby the clause in the set-
 v. " tlements of the above estates, which provides,
 HAMILTON, " that in case of the defenders succeeding to the
 &c. " said lands, any other money or estate left by the
 " said Duke and Duchess to the defender, should
 " fall and appertain to his hail younger brothers,
 " and their heirs male, equally among them, was ef-
 " fectually altered ; and that, therefore, the defen-
 " der is not bound to pay to the pursuers the said
 " sum of L.40,000," &c.

(John, Earl of Selkirk, and Mr. Basil Hamilton died after these interlocutors were pronounced ; but it is unnecessary to detail the proceedings that took place, in consequence.)

Entered 22
 March, 1744.

An appeal was brought by Lord Archibald Hamilton from that part of the interlocutor of the 22d January, 1742, which relates to the L.40,000, and from the interlocutor of the 4th February, 1742.*

Entered 6
 Feb. 1744.

A cross appeal was brought by the Countess of Ruglen, and her son the Earl of March, from that part of the interlocutor of the 22d January, 1742, which relates to the L.20,000 bond, and from an interlocutor of the 18th November, 1743. To this appeal the representatives of Basil were made parties.

Pleaded for the Appellant, (Lord Archibald:)
 —1. (As to the L.40,000 bond.) By the clause of devolution in the settlement of 1693, it was fix-

* He likewise appealed from an interlocutor of the 26th January, touching the superiority of certain lands, the particulars of which claim it is thought unnecessary to detail.

ed that all the provisions made in favour of Lord John were, in the event of his succeeding to the Crawford estates, to appertain to the younger brothers ; and he cannot claim under that settlement, unless he complies with this provision.

1745.

 CASSILIS, &c.
 v.
 HAMILTON,
 &c.

Although a power of revocation was reserved, it cannot be considered as an implied revocation of this proviso, that the Duchess, in the provision of the L.40,000 bond to Lord John in 1693, declared that any part of this sum, which shall be unuplifted at his succession, shall return to the family, but omits to say, as was done in a clause of the former settlement, that, what shall have been paid to the said Lord, shall fall to his younger brothers, and their heirs male, equally among them.

Neither can it be considered as a revocation of this proviso, that she consented to the marriage contract of Lord John. The only difference thereby made was, that she so far dispensed with the power of revocation ; and that the bond was made payable immediately, instead of being so only after her death. The proviso still remained that, if Lord John succeeded to the Crawford estates, he must make that sum good to his younger brothers.

2. (With regard to the bond for L.20,000.) There is no doubt that this sum was part of the provision for Lord John, and that the money was actually received by him ; and, therefore, by the express words of the settlement in 1693, all the provisions and estates so received were to devolve to his younger brothers, and their heirs male, equally. It cannot then be a doubt that the money must be paid, and there can be as little

1745.
 CASSILIS, &c.
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 &c.

doubt to whom this payment is now to be made, since, whatever was the destination in the first settlement of 1685, a power of alteration was therein reserved, and this power was effectually exercised by the settlement of 1693.

Pleaded for the Respondents, (the Countess of March and Ruglen, and the Earl of March :)—

1. The devolving clause in the settlement 1693, (whereby, if Lord John or any of his younger brothers should succeed to the Crawford estate, such part of their provision as remained unpaid should sink for the benefit of the heir at law, and such other part as should have been actually received should be divided amongst, and payable to, the next younger brothers, and their heirs male,) was, in many respects, altered by the bond granted in September 1693, to Lord John by the Duchess. By the former, such provisions as might have been actually received were, upon his succession to the Crawford estates, to be divided equally among his younger brothers. By the latter, £40,000 were settled upon Lord John, his heirs and assignees, and the only proviso is, with regard to such part of it as should remain unpaid at the time of his succession to either of his elder brothers, and this part is directed to be sunk, and to return to the heir and representative of the family of Hamilton.

The words "to his heirs and assignees," convey an absolute interest in whatever may have been paid.

But, if there were any doubt, this is entirely removed by the marriage contract of Lord John. A power of revocation and alteration was reserved, in the bond, to the longest liver; and the

Duchess having survived the Duke, had this power, and exercised it effectually by the part she took in the contract. She then renounced all power of revocation, and made the sum payable at the first term thereafter, instead of the first term after her decease ; and by this means gave him an unlimited valid right in the whole sum, and freed it of the condition in favour of the heir of the House of Hamilton.

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&c

Further, the Duchess, after having thus conferred an absolute interest in this sum, is a party to Lord John's marriage contract, whereby this and other sums are settled upon the heirs of the marriage without any condition as to Lord John's succeeding to the Crawford estates ; whereby she who alone had the power of altering the former destination, secured as well the sums actually paid as those unpaid, at the time of the succession opening to Lord John, upon him and the issue of his body.

2. The special destination in 1685 of the L.20,000 bond, with the clause of devolution therein contained, was not altered by the posterior devolving clause in the settlement of 1693. It is a rule of construction, that a prior special conveyance is not to be defeated by a subsequent conveyance in general terms, and relating principally to other subjects. But, admitting that the former destination had been so defeated, and that Lord John could not gratuitously alter this last conveyance, yet he might and did alter it by his marriage contract ; for such a contract is not gratuitous, but rational and onerous.

“ Ordered and adjudged that the interlocutor of Judgment,
March 21,
1745.

1745. " the 22d January, 1742, complained of, be, and
 OCHTERLONY " the same are hereby affirmed."
 v.
 HUNTER.

For the Earl and Countess of Cassilis, *Ro. Craigie,*
C. Erskine.

For the Countess of Ruglen and Earl of March,
A. Hume Campbell, Alexander Forrester.

For Lord Archibald Hamilton, *Wm. Murray,*
W. Hamilton.

GEORGE OCHTERLONY, - - *Appellant ;*
 ARCHIBALD HUNTER, *et alii,* - *Respondents.*

9 April, 1745.

BILL OF EXCHANGE.—Found that one who had retired bills in London, *supra* protest, for the honour of the drawer, (who was in Scotland,) was not debarred of his recourse against the drawer, although he did not give notice of the dishonour of the bills for eight days.

Found also that this was a sufficient notification of the dishonour of other bills, retired in the same way, although payable after the date of the letter.

[Kilkerran, p. 73. Elch. *voce* Bill of Exchange, No. 32 ; Dict. III. 54 ; Mor. 1567 ; Brown's Supp. v. 733.]

No. 76.

SEVERAL bills were drawn in Scotland by Hunter, upon Charles Murray in London, payable to Peter Murdoch, merchant in Glasgow, or order. These bills were paid by Ochterlony *supra* protest, for

the honour of the drawer. There were a variety of questions between the parties ; but the present report relates only, 1st, to a bill for L.400, dated the 19 March, 1796, which was paid by Ochterlony on the 18 May following ; 2dly, to a bill dated 19 March for L.250, and paid 22 May, with regard to which two bills, Ochterlony, on the 26 of May, wrote to Hunter, saying, " I have paid all of them " that have fallen due since the 18 March last, " *supra* protest, for your honour, &c." and 3dly, to certain other bills which were paid in the same way subsequent to the date of this letter.

1745.

 OCHTERLONY
 v.
 HUNTER.

In the action at Ochterlony's instance, against Hunter (the drawer) for recourse, the question occurred, How far one who pays *supra* protest, for the honour of the drawer, is bound to give the same timeous notification, as the holder is of the dishonour of the bill ?*

The pursuer argued, that there was a great difference between the case of a bill being paid *supra* protest for the honour of the drawer, and that of a bill being protested for non-payment or non-acceptance by the holder of it. In the latter case, the holder undertakes diligence in virtue of the bill contract, and the most exact diligence therefore is required in every respect, and particularly in the point of notification ; and if he fail in this, he is held to have lost his recourse, although damage cannot be proved : but it is different with regard to him who pays *supra* protest for the honour of the drawer. He has undertaken no diligence, and has interfered merely from motives of friendship,

* With regard to certain bills, which had been paid a considerable time before the date of the letter above referred to, it was held to be clear that the pursuer had lost his recourse.

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 OCHTERLONY
 v.
 HUNTER.

and can therefore only lose his recourse, if it be proved that damage has been incurred by his interposition, and by his failure to notify.

Hunter answered, that the two cases were the same ; that the drawer ought not to be put in a worse case by another's interposing than he would have been had it been left to the holder to notify the dishonour ; and that the reason of the thing applied to both cases, viz. that the drawer may be put on his guard, to secure the effects of the person on whom he has drawn the bills.

The Lord Ordinary, Dun, (February 8, 1743,) remitted to Messrs. Coutts, Arbuthnot, and Hay, bankers in Edinburgh, to report their opinion ' as
 ' to what time notification ought to be sent to the
 ' drawer of a bill, and how soon that the same is
 ' dishonoured by not payment, in order to entitle
 ' to recourse ; and as to the effect of the pursuer's
 ' letter of notice to the defender of the 26 May,
 ' and what effect the said notification might have,
 ' both with respect to the bills formerly due, tak-
 ' ing notice of the respective terms of payment,
 ' anterior to the said notification, and also what
 ' effect the same can have with respect to those
 ' bills which were on the said 26 May not due or
 ' payable, but which were afterwards paid by the
 ' pursuer, and whereof he gave notification that
 ' they were dishonoured ; and allowed either party
 ' to get what opinions they thought fit from mer-
 ' chants in Edinburgh or in London, to clear up
 ' the custom observed in such cases.'

The gentlemen above named reported their opinions to be, that in the case of a bill taken up *supra* protest for honour of the drawer, in order to entitle the payer of the bill to recourse, notifi-

cation ought to be made to the drawer the post immediately after taking up the bill or the next following post. That therefore the letter of 26 May was not due notification with regard to a bill that had been received five days before its date. On the other hand, the London bankers were of opinion that by law as well as by custom of merchants, a person who retired a bill *supra* protest for the honour of the drawer, was allowed fourteen days to notify the same to the drawer, in order to entitle him to recourse, and that the letter of the 26 May was a sufficient notification for all the bills that fell due within fourteen days after the date of the said letter; and they therefore thought Hunter liable unless he could show that he had sustained loss for want of notification.

1745.
OCHTERLONY
v.
HUNTER.

The Court, (24 November, 1743,)* found that the letter of the 26 May was a sufficient notification to entitle the pursuer to recourse against the defender for two of the bills, viz. the bill of the 19 March, which was paid on the 18 May, and the bill of the same date, paid on the 22d; but found that the said letter was not a sufficient notification of the dishonour of the bills paid after its date. But upon advising a reclaiming petition and answers, the Lords found, 'That the above letter was
21 Dec. 1743.
' not a sufficient notification to entitle the pursuer
' to recourse for the bill paid on the 18 May; and
' they adhered to the rest of the former interlocutor.'

An appeal was brought from that part of the interlocutor of the 24 November, 1743, which found
Entered
17 Jan. 1744.
that the letter of the 26 May was not a sufficient

* See Kilkerran as to the opinions of the Court.

1745. notification of the dishonour of the bills paid after
 OCHTERLONY its date, and also from the interlocutor of 21 December.

v.
 HUNTER.
 Judgment,
 9 April, 1745.

After hearing counsel, "it is ordered and adjudged, &c. That so much of the interlocutor of the 24 November, 1743, whereby it is found, 'That the letter of the 26 May, 1736, was 'no sufficient notification of the dishonour of the bills paid by the appellant after the date of said letter,' and also so much of the said interlocutor of the 21 December, 1743, whereby it is found," 'that the said letter was not a sufficient notification to entitle the appellant to recourse against the said Robert Hunter for the bill dated 19 March, 1736, and paid *supra protest* on the 18th May thereafter,' be and the same is hereby reversed; "And it is further ordered and adjudged, that the residue of the said interlocutors complained of be, and the same is hereby affirmed."

For Appellant, *Ro. Craigie, W. Murray.*

For Respondents, *A. Hume Campbell, C. Erskine.*

This reversal is not noticed in the reports. Kilkerran, however, states, that the judgment of the Court of Session proceeded on the ground that Hunter was "only a nominal drawer, whose faith was not followed by the porteur of the bills, the person by whom they were payable, nor by Ochterlony, who accepted *supra protest* for honour."

1745.

CATANACH,
&c.

v.

GORDON, &c.

JAMES CATANACH, *et alii*, - *Appellants*;
 C. H. GORDON, and R. PATERSON,
 Vice-Chancellor of the Univer- } *Respondents*.
 sity of Aberdeen, - - -

11 April, 1745.

PROFESSOR OF LAW.—It being required by the foundation of a college, that the professors of law should be doctors of laws, or at least licentiates, *cum rigore examinationis*,—an objection that the college could no longer confer that degree legally, was not sustained against one who pretended to be so qualified.

[Elchies, *voce* Prof. of Law, No. 1; Falc. I. p. 15; Fol. Dict. iv. 154; Mor. Dict. 12,253.]

A vacancy having occurred in the professorship No. 77. of Civil Law in the King's College of Aberdeen, a meeting for election was held on 8th June, 1743. By the foundation of the college, it is required that the several professors should have attained the degree of doctor in their respective sciences, “*si tales commode haberi possint; alioquin, in iisdem facultatibus licentiati cum rigore examinis, qui infra annum a die admissionis eorum in dicto Collegio ad Doctoratus gradum singuli in praefatis facultatibus se faciant promoveri.*” A majority of votes appeared in favour of James Catanach, Advocate in Aberdeen, upon whom a degree of doctor of law had been conferred by the Marischal College of Aberdeen. The remaining votes were given in favour of Charles

1743. **CATANACH, &c.** Hamilton Gordon, a member of the Faculty of Advocates in Edinburgh.

GORDON, &c. Each of the parties obtained a presentation in his favour, and a competition before the Court of Session ensued, in the form of an action of multiple-poining, at the instance of Mr. Paterson, the Vice-Chancellor. The appellant **Catanach** maintained that having received the degree of doctor of law from the Marischal College of Aberdeen, he was duly qualified. That college, by its charter, confirmed in various acts of Parliament, had full powers of bestowing all academical degrees, and receiving new professors: the dean of faculty is particularly appointed to preside "in promotionibus ad quemcunque *gradum*;" and by act of Parliament 1593, (confirmed in 1661) there were granted to the college "all freedoms, franchises, liberties, free privileges, and jurisdictions that to any free college within this realm by law and practice is known to appertain." Gordon's qualification cannot be admitted, for where founders have required a particular qualification, a court of law cannot substitute an equivalent for them. If, however, in this case equivalents are to be admitted, then, even holding the appellant's diploma to have been inept, to the effect of conferring on him a degree in terms of the charter, the parties are in that respect in *pari casu*, and his plurality of votes must prevail.

The other appellants (viz. the majority of electors) likewise insisted that they were the proper and sole judges of the qualification of the candidates, and that their decision was not subject to the controul of the Court of Session.

Gordon maintained that since the Reformation,

the practice of granting degrees in civil law, had been discontinued in the Scotch universities,—that the only degree in law now in use, was that of advocate granted upon certain trials, (including a trial in the civil law) before the Faculty of Advocates, and that he, having been so admitted advocate, must be held tantamount to a doctor in the civil law, and as such, capable of being elected professor of the civil law in any university. Mr. Catanach was not duly qualified. The diploma had been conferred upon him *per saltum* and without any previous study, the night immediately preceding the election, which was plainly an evasion of the terms of the charter; but the college in question never had power to grant such a degree, having been founded after the Reformation, when the practice had ceased in all Scotch colleges; and especially having been erected only for the study of the “liberal arts,” and having no foundation for divinity, law, or physic, it never could confer degrees in these sciences.

1746.
CATANACH,
&c.
v.
GORDON, &c.

The Court found (20 July, 1744) “that James Catanach, Advocate of Aberdeen, was not duly qualified to be elected a professor of civil law in the King’s College of Aberdeen, and that Mr. Charles Hamilton Gordon was duly qualified to be elected into the said office; and found Mr. Gordon was duly elected, and preferred him to the said office,” &c.

An appeal was brought from the interlocutors of 20 July and 4 December, 1744.

Entered,
Dec. 14, 1744.

After hearing counsel, “it is ordered and adjudged, &c. that the interlocutors complained of be, and the same are, hereby reversed; and it is further adjudged that the appellant, James

Judgment,
April 11,
1745.

1746. **CHALMERS**
v.
ALISON, &c. “Catanach, was duly qualified to be elected a professor of civil law in the King’s College of Aberdeen, and was duly elected: and it is also ordered and adjudged that the appellant, James Catanach, be preferred to the said office accordingly.”

For Appellants, *A. Hume Campbell, E. Erskine.*
For Respondents, *R. Craigie, W. Murray.*

CAPTAIN CHALMERS of Gadgirth, *Appellant*;
PORTER ALISON, *et alii*, his Vassals, *Respondents.*

9 May, 1746.

SUPERIOR AND VASSAL.—NON-ENTRY.—Found that vassals who had been in non-entry for upwards of 40 years, were not liable in the arrears of the retoured duties, it being uncertain in whom the right to the superiority of the lands was vested during that period.

[*Elchies, voce Non-entry, No. 3. Mor. p. 15091 and 9330.*]

No. 78. IN 1692 the estate of Chalmers of Gadgirth was adjudged by his creditors, one of whom, Sir David Cunningham, obtained a charter of adjudication, on which he was infeft in 1693. In 1695, the adjudgers by agreement, divided the estate among themselves; but no mention was then made of the superiority of the lands possessed by the respondents. Thereafter the appellant not choosing to

make up a title to the estate as heir, acquired right to this adjudication by a conveyance from Sir James Cunningham, the heir of Sir David, upon which he obtained a charter from the crown in 1742, and was infeft in Feb. 1743. During all this period, the lands held blanch by the respondents, were in non-entry.

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CHALMERS
v.
ALISON, &c.

The appellant, having thus established in himself a title to the superiority of these lands, brought a declarator of non-entry to have it found that the lands had been in non-entry for 40 years, and claiming the retoured duties during that period, and the full rents since citation.

In defence it was pleaded, that as it was by the fault of the superior, and the confusion of his affairs, that the respondents were unable to ascertain who their superior was, and to whom they ought to apply for an entry, they ought not to suffer for a supposed contempt by being found liable even in the retoured duties; that the appellant not having made up a title as heir, was not in a condition to enter vassals; and as to the adjudication, he was not thereby entitled to any of the casualties incurred prior to the date of the conveyance, being only then enabled to grant investitures. —That the claim for non-entry, though extended no farther than to the retoured duties, was to be considered penal, and therefore unfavourable in the eye of the law.

It was answered that, in strict law, the superior is entitled, during the non-entry of his vassal, to the full rents of the lands; but that the claim is usually restricted to the feu-duties in feu-holdings, and to the retoured duties in blanch holdings, incurred prior to citation, but extended to the full

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 CHALMERS
 v.
 ALISON, &c.

rents thereafter, because then the vassal's contempt of his superior, in neglecting to enter, is the more manifest ;—that it was no excuse for not entering that the heir of the superior had not established a title to enable him to give a new investiture, because, in such a case, the law has pointed out a proper remedy by the act 1474, c. 57.

There could be no dubiety as to the superior, for the vassals might easily have known from the record to whom they should apply for an entry. Sir D. Cuninghame, and afterwards his son, being infest on their charter of adjudication, in the whole estate of Gadgirth, became fully vested in the superiority, and as much entitled to the casualties as the appellant's ancestors had been, from whom the right of superiority was adjudged. It is clear, therefore, that Sir David or his son might have brought the present declarator, and that the defence founded "on the superior's estate being encumbered or adjudged," would not have availed; and if the claim would have been competent to them, it cannot be maintained that the right of superiority, when conveyed to the appellant, is less available in his hands than in theirs.

Although the casualties of superiority are more or less a burden on the vassal, according to the nature of the holding, they are not less the estate of the superior, than the *dominium utile* is the vassal's; and a claim for non-entry is most favourably regarded when it extends to the retoured duties only. Every lawful vassal is presumed to know, that by possessing an estate to which he is not entered by the superior, he subjects himself in the retoured duty yearly, and therefore it is his own fault if an arrear is incurred.

The Lord Ordinary found, (9th June, 1744,) 1746.
 "That in this special case, the defenders are not CHALMERS
 "liable for either retour or non-entry duties pre- v.
 "ceding the date of the pursuer's charter." ALISON, &c.

Upon a reclaiming petition, the Court found, (19 June, 1745,) "That whereas the petitioner does
 "not claim the superiority as heir to his predeces-
 "sor, but as a singular successor, therefore ad-
 "here," &c.

The appeal was brought from the interlocutors Entered,
 of 9 June 1744, 19 and 29 June 1745. Dec. 10, 1745.

Pleaded for the Appellant.—Although the law of Scotland is indulgent in admitting excuses to mitigate the superior's claim for his non-entry duties, when that is made for the full rents of the estate, yet, in all cases, the vassal continuing in non-entry, is subjected in the retoured duties, which are only a part of the real profits of the estate. It was of no consequence, that the appellant claimed these duties as a singular successor, it being immaterial to the vassal, whether the superior was served heir to his ancestor, or acquired his right to the superiority by singular titles. His title to the estate in either case, and that of his authors, were unexceptionable; and, therefore, notwithstanding the confusion in the affairs of the family of Gadgirth, the respondents could never have been at a loss to know their true superiors.

Pleaded for the Respondents.—Where the non-entry is occasioned by the fault of the superior, or where, from any circumstances, the superior is uncertain, nothing is due by a vassal in respect of his non-entry; and in the present case, the appellant and his father, the apparent heirs in the superiority, were in no condition to have entered the

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respondents previously to the charter and infeftment in 1743. Until that period, it was uncertain in whom the superiority was vested, whether in the apparent heir of the family of Gadgirth, or in the adjudgers of the estate; among the adjudgers themselves, it was uncertain who had the greatest interest in the superiority, neither did it appear from the agreement in 1695, that it had been allotted to any of them in particular. This uncertainty is a sufficient defence against the consequences of non-entry.

As to the argument on the statute 1474, c. 57, this act does not apply to those cases where the superior is uncertain; and, moreover, the object of it was to afford to the vassal relief against his immediate superior, who refused or neglected to enter him, but it was not intended to give any benefit to the superior, who was himself unentered. Although the vassal therefore may not urge the forfeiture, he is not thereby subjected to any claim at the instance of his superior, to which the latter would not have been entitled independently of the statute; and least of all to a claim for the non-entry duties, when the superior himself was not in a condition to have entered the vassal.

Judgment,
 9 May, 1746.

After hearing counsel, “it is ordered and adjudged, &c. that in the interlocutor of the Lord Ordinary, after the words, (‘that in this special case,’) these words, (‘it appearing that before the charter granted to the appellant, it was uncertain in whom the right of superiority of the lands in question was vested,’) be inserted, and that in the interlocutor of the Lords of Session of 19 June, 1745, these words, (‘find that whereas the petitioner does not claim the superiority as heir to

‘ his predecessor, but as singular successor, there-
 ‘ fore,’) be left out ; and it is hereby farther or-
 “ dered and adjudged that with these variations,
 “ the several interlocutors complained of be af-
 “ firmed.”

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GARDEN

v.

RIGG.

For the Appellant, *W. Grant, W. Murray.*

For the Respondents, *Al. Forrester, Ch. Are-
 skine.*

ALEXANDER GARDEN of Troup, - *Appellant* ;
 THOMAS RIGG of Morton, Advocate, *Respondent.*

28 January, 1748.

PRESCRIPTION. — INDEFINITE PAYMENT.

Two bonds due to the same party being prescribed, and the debtor in them having made an indefinite payment “ to ac-
 compt,” during the currency of the prescription, it was found
 that the prescription of both bonds was not thereby interrupt-
 ed, but that the debtor might impute the payment to either
 of them.

ANNUAL RENT.—Interest found to be not due upon a missive
 not bearing a clause of interest.

PERSONAL OBJECTION.—A bill of exchange being so framed as
 to afford a legal objection to its validity, it was found that the
 acceptor, having been confidential lawyer to the drawer, was
 barred *personalis objectione* from pleading the objection.

BILL OF EXCHANGE.—Bills of exchange having lain over for
 twenty-eight years, without protest or demand, it was found
 by the Court of Session, that no action lay upon them, unless
 supported by the acceptor’s oath upon the verity of his sub-
 scription. *Reversed* on the circumstances of the case.

[*Elchies voce* Prescription, No. 25 ; *voce* Advocate, No. 1 ;
 C. Home. *Falc.* Kilker. Mor. 1628, 10450, 11274.]

ARNOT lent Rigg several sums of money, on the No. 79.
 following among other documents : 1st, A bond

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ARROT.

for 1100 merks Scots, dated 25 January, 1697, and payable at Whitsunday following, and bearing interest. 2d, A letter of 12 October, 1697, acknowledging the receipt of 300 merks Scots, but this did not bear an obligation of interest. 3d, Two bills of exchange drawn by Arrot, and accepted by Rigg, the one dated 11 May, 1708, for L.560, 18s. 4d. Scots, the other 2 April 1712, for L.40 Sterling, and each bearing interest from its date, and a penalty of one-fifth in case of failure.

On the 4 October, 1698, Rigg paid L.7 to account; for which Arrot gave a receipt as "in part payment of what he is indebted to me, which sum I oblige me to allow him at account."

In 1728, Arrot executed a settlement of his whole estate in favour of Alexander Garden of Troup, who in September, 1738, raised an action against Rigg for payment of the 1100 merks contained in the bond of 25 January, 1697, and of the 300 merks contained in the letter of 12 October, 1697. Defences were given in; but before judgment, Mr. Garden died; and his son, the appellant, in 1740, brought a new action, not only for the sums concluded for in his father's summons with interest, but also for the sums contained in the above mentioned bills.

With regard to the former, the defence was, that they had prescribed, before action was raised upon them; to which it was answered, That the prescription had been interrupted; 1st, By the partial payment in 1698; and, 2dly, By a submission, entered into by Arrot in 1728.

Replied for Rigg, that he had applied that partial payment of L.7 in part payment of the 300 merks, and not in extinction of 1100 merks, or the

interest thereof; and it was further insisted that the letter acknowledging the receipt of the 300 merks, not having a clause to that effect, ought not to bear interest.

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With regard to the *bills*, it was argued that as they contained a clause of interest and a penalty, they lost the privilege of bills of exchange, and were void.

It was answered, that Rigg, having been the man of business for Mr. Arrot, and the acceptor of the bills, could not plead this objection against his own act and deed, to the prejudice of his employer.

Upon the report of the Lord Ordinary, (Elchies) "The Court (26 November 1743,) sustained the defence of prescription against the bond for 1100 merks, but sustained the interruption of prescription as to the 300 merks, in respect the defender had applied his indefinite payment to that debt; and they repelled the interruption founded on the submission, and found no interest due upon the letter for the 300 merks; and found that the defender being at the date of the bills ordinary lawyer and trustee to Mr. Arrot, he was thereby barred from objecting against the form of the bills; and remitted to the Lord Ordinary to proceed." Thereafter the Court adhered.

Rigg pleaded that the two bills were prescribed, for although bills of exchange contrary to the ordinary rule of the law of Scotland, but in conformity to the practice of other trading countries, are now obligatory and do produce action, although not probative; yet this extraordinary privilege being allowed to them only while circulating, in order to facilitate commerce, must cease whenever

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they are suffered to lie over for a number of years, as permanent securities for money. In the present case, no claim having been made for so long a period, they cannot now be sustained without other evidence in support of them.

To this it was answered, that the above interlocutors repelling the objection against the form of the bills, virtually sustained the bills as sufficient and legal documents in every respect,—Rigg never having denied his subscription and acceptance.

The Lord Ordinary (13 December, 1748.)

“ In respect of the Inner-House interlocutor, “ sustains the bills to the extent of the principal “ sums and interest from the several terms of payment,” &c.

Upon a reclaiming petition, the case was reported, when, by a majority of one, the Court found (January 6, 1747) “ That no action lies on those “ bills which have lain over so long a time, without demand, unless supported by Mr. Rigg’s “ oath upon the verity of his subscription to the “ acceptance.” And upon advising another petition, in which it was pleaded, that there was no law or statute authorising the alleged prescription of bills; the Court “ adhered.” (February 11, 1747.)

Entered,
March 3,
1748.

The appeal was brought from these several interlocutors, in so far as they sustained the defence of prescription against the bond for 1100 merks; found no interest due upon the letter for 300 merks; repelled the interruption founded on the submission; and found that no action could be on the bills, unless supported by the respondent’s oath as to the verity of the subscription to the acceptance.

Pleaded for the Appellant.—1. The receipt for

L.7, expressly bore to be in part payment of what was due at the date of it; and at that time the respondent was indebted to Mr. Arrot in two sums only, viz. the 1100 merks, and the 300 merks. The partial payment, therefore, was applicable in terms of the receipt, in part payment of both these debts; and the respondent cannot, by any subsequent election, depart from the manner of appropriation stipulated by the receipt. If any part of the L.7 be applied in payment of the 1100 merks, the prescription of that debt is interrupted.

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The rule as to the application of an indefinite payment is, that where there are debts bearing interest, it shall be imputed, in the first place, to extinguish the interest, and no election is afterwards competent to the debtor, especially when it is attempted, as in the present case, to evade a just debt, upon the odious defence of prescription.

2. The debt of 300 merks ought to bear interest, because the respondent being authorised by Mr. Arrot to receive that money on his account, he retained it and converted it to his own purposes, without Mr. Arrot's consent. It is clear that if he, being thus trustee or mandatory for Mr. Arrot, as to the sum, had taken it upon himself to lend it (having received it from a debtor of Mr. Arrot's,) to a third person, without interest, he would himself have been answerable for the interest, by way of damages; and he ought not to be placed in a better situation by having applied the money to his own use.

3. As to the bills, all writings which bear the essentials of a deed are probative. They prove themselves, and are presumed to be genuine till

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disproved, nor are they cut off by prescription till after a lapse of forty years; and all bills of exchange, whether foreign or domestic, are ranked in the same class. Though there are acts of parliament, introducing shorter prescription, yet these do not extend to bills of exchange, which have always been deemed probative for forty years; and if the privileges of these documents is not by law prescribed, the creditor cannot be deprived of it, and compelled to prove their authenticity *akunde* on the single ground of his having delayed for a time to sue on them. Every circumstance of the present case tends to show that the bills are still resting owing. His first defence (their alleged nullity) implied an admission of their authenticity, and the plea of prescription likewise supposes that they had once been good documents of debt. In fact, the respondent has never expressly denied that he accepted them.

Pleaded for the Respondent:—1. As no action was instituted upon the bond, and no other legal document taken upon it for more than forty years, it is clearly prescribed.

2. No capital sum bears interest, except either where the law has so appointed it, or where it is expressly stated in the writing. In the present case, there is neither law nor paction to this effect.

3. Bills of exchange have peculiar privileges for the benefit of commerce, if they are demanded within such a reasonable time, as they may be supposed to lie over in the course of commercial dealings; but if they are allowed to lie over for a much longer period of time, without any demand being made upon them, they cease to have the same credit and privileges, or to be esteemed (con-

trary to the ordinary rule of law) sufficient proofs in themselves of a debt due, and of grounds of action. In the present case it cannot be presumed that the bills are still due, otherwise the appellant's father would undoubtedly have included them in the action which he raised for the two other sums, being undoubtedly possessed of them as well as of the other documents.

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After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutor of the 6th January 1747, whereby the Lords of Session found, 'That no action lies on those bills which have lain over so long a time without demand, unless supported by the respondent's oath upon the verity of his subscription to the acceptance,' be reversed; and that the interlocutor of the same Lords of the 11th February following, adhering to the said interlocutor, be also reversed, and it appearing that the said bills are not of a commercial nature, nor proper bills of exchange, it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of 13 December 1743, be affirmed; and it is likewise ordered and adjudged, that the interlocutors, or such part thereof as are complained of in the said appeal be, and the same are hereby affirmed."

Judgment,
28 Jan. 1748.

For the Appellant, *W. Grant, W. Murray.*

For the Respondent, *James Graham, C. Erskine.*

Kilkerran, at the end of his Report, says, "This judgment was on appeal reversed; and, as is informed, not on the general point, but on the circumstances of the case; so that the general point may still be thought entire, should a question hereafter occur upon it."

1749.

<hr style="width: 100%;"/> GRANT SUTHERLAND.	Sir LUDOVICK GRANT, <i>et alii</i> , JAMES SUTHERLAND, and his TUTOR <i>ad litem</i> ,	. . . } - - -	<i>Appellants ;</i> <i>Respondents.</i>
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11 May, 1749.

PASSIVE TITLE UNDER THE ACT 1695.—HEIR APPARENT.—

POSSESSION.—A debtor having died in apparenry, after having been in possession of an estate for three years, and decrees of constitution and adjudication having been deduced against his infant son, who had been charged to enter heir without renouncing: Found that these decrees were so far effectual against the son, as to attach the lands possessed by the father in apparenry.

The possession by a life-rentrix of part of the lands, in virtue of a right not flowing from the heir apparent, is not accounted the possession of the heir, so as to subject the life-rented lands in terms of the statute. Neither was that part of the life-rented lands subjected, which the heir apparent had acquired and possessed under a contract of excambion with the life-rentrix.

[Falconer, 2, 14. Kilk. 372. Elchies, *voce* Minor, No. 12 ; Kames's Remark, Dec. 2. 172 ; Mor. p. 5265.]

No. 80. ALEXANDER Sutherland died in possession of the estates of Kinminity and Clyne, after having contracted considerable debts. In the former estate he had been infest in virtue of a conveyance from his wife. The latter, it was alleged, he had possessed for more than three years, as apparent heir to his father. The estates then devolved to his son James, the respondent, a minor, and the appellants, who were creditors of Alexander, charged the respondent and his guardian to enter him heir in general to his father in his whole estate, and afterwards brought separate actions of constitution, in which they obtained decrees. They

then charged him to enter heir in special to his father and other predecessors last infeft in the estates of Kinminity and Clyne; and they afterwards obtained decrees of adjudication against both estates, as the minor and his guardians did not renounce.

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Upon application of the creditors, the court sequestrated the two estates, except such parts of the estate of Clyne as were liferented by the respondent's grandmother.

The creditors afterwards brought an action of ranking and sale of the estate, in which the respondent was called as defendant.

The respondent brought a counter action of reduction, for reducing the above decrees of constitution and adjudication, in so far as they affected his person, and the estates of Kinminity and Clyne, upon the head of minority and lesion. He likewise gave in a renunciation to enter heir to his father. The appellants admitted that he should be relieved from the personal effect of the diligence; but insisted that as to the estates, of which his father had been in possession, the same should remain in full force.

The Lord Ordinary, Tinwald (21 Nov. 1746,) “ repelled the reasons of reduction of the decrees “ of constitution and adjudication obtained at the “ instance of the defenders, (appellants,) against “ the pursuer, by which the lands and estate of “ Clyne, and others in them mentioned, pertaining to his predecessors, have been adjudged by “ the defenders for payment of his predecessor's “ debts, and that in so far as concerned the said “ lands allenary; but reponed the pursuer, and “ sustained the said reasons of reduction, quoad the “ pursuer's person, and separate estate, in respect of

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 SIR L. GRANT
 v.
 SUTHERLAND. “ the pursuer’s minority and his renunciation pro-
 “ duced; and found that the foresaid decree of
 “ constitution and adjudication obtained against
 “ him on the grounds of debt in them contained,
 “ could not affect the pursuer, nor any other means
 “ or estates belonging to him, or to which he may
 “ succeed or make up titles, other than these lands
 “ and estates already comprehended under the said
 “ diligences of adjudication, and which are affected
 “ for payment of his predecessor’s debts; and assoil-
 “ zied from the reduction,” &c.

In a representation against this interlocutor, Sutherland pleaded—*First*, That, supposing he had possessed the estate of Clyne, this would not have subjected him in payment of his father’s debt, either by common law previous to the statute 1695, or in virtue of that act. By the construction which had been put upon the statute, the heir who only possessed the estates of his predecessors, without making up a title, either by service or adjudication, has not been subjected to the debts of his predecessor, who died in apparenacy; and in the present case the respondent has not made up a title in either of these ways: *Secondly*, that certain parts of the estate of Clyne had been life-rented by his grandmother, and never were in the possession of his father, who predeceased her; and therefore could not be affected by the appellant’s diligence.

It was answered, *1st*, That the steps of diligence resorted to by the appellants did not depend upon the act 1695. They were introduced by various acts of parliament long previous to that act, and were therefore complete and effectual without it. But, *2dly*, That the construction which had been

put upon the act 1695 was not sound, as it tended in a great measure to defeat the intention of the law for "preventing the frauds of apparent heirs," and was not agreeable to the words of the act, by which it was provided, "That if any apparent heir enter to *possess* his predecessor's estates, such possession shall be reputed a behaviour as heir, and a sufficient passive title to make him represent his predecessor universally." But, *3dly*, That supposing this construction had been just, it would amount to no more than this, that the statute had left one obvious fraud of apparent heirs not provided against, an omission which could never entitle the respondent, on pretence of minority, to be restored to an opportunity of practising such fraud, which was truly the object of the reduction. *4thly*, That with respect to that part of the lands which had been liferented by the respondent's grand-mother, it was clear that Alexander Sutherland's possession of part of the estate of Clyne amounted to a behaving as heir in the whole. The fee of the part liferented belonged to him; and besides the liferenter did, by contract with her son, exchange a part of the liferent lands for a part of those not liferented, in virtue of which Alexander, her son, possessed that part of the liferent, and thus behaved as the heir in the whole.

The Lord Ordinary (24 Dec. 1747,) found, that the "possession of the said Jean Gordon, under the contract of marriage, was not to be considered as the possession of the said Alexander Sutherland, her son, the apparent heir, so as to subject the pursuer passing by the said Alexander, his father, and making up titles to the liferented lands, to her said father's debts; and also found,

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“ that such parcels of the liferent lands, as were
 “ possessed by the said Alexander Sutherland, only
 “ in consequence of the contract of excambion,
 “ were not to be considered a possession within the
 “ statute 1695 ; and therefore sustained the reasons
 “ of reduction, and reduced the creditor’s diligence
 “ with respect to the lands possessed by the said
 “ Alexander Sutherland, in virtue of the said con-
 “ tract of excambion ; but found that in as far as
 “ concerned the lands possessed by the said Jean
 “ Gordon, the liferentrix, as deriving right from
 “ the said Alexander Sutherland, in virtue of the
 “ said contract of excambion, her possession was
 “ to be held as the possession of the apparent heir ;
 “ and therefore found that the rights and diligences
 “ of the creditors as to these lands, as well as to
 “ the other lands not liferented by the said Jean
 “ Gordon, did subsist, and with respect to these
 “ repelled the reasons of reduction, and adhered to
 “ the former interlocutor, with these alterations,
 “ and decerned.”

Sutherland reclaimed against this interlocutor, in
 so far as it found that the liferentrix’s possession of
 the lands exchanged with her son was to be held as
 the possession of the apparent heir, and that the de-
 fender’s diligence did subsist as to these as well as
 to the other lands which were not liferented ; and
 maintained that the appellant’s decrees of constitu-
 tion should be reduced so as to have only the effect
 of decrees *cognitionis causa*, and the adjudication
 following on them, so as only to affect lands legally
 vested in the person of Alexander Sutherland, and
 consequently that they should be reduced as to the
 estate of Clyne.

It was answered, that it was upon the credit of the

two estates that the creditors had advanced the several sums to Alexander Sutherland now claimed by them, that he had possessed the estate of Clyne above three years on his apparenacy, and therefore that in pursuance of the act 1695, this estate was equally liable for his debts. The respondent could not make up a title to it without being liable at least *in valorem*, and it was impossible for him, therefore, to plead lesion, more particularly as the creditors had, on account of his minority, relieved him from the personal effect of their diligence.

On the other hand, the creditors reclaimed against so much of the interlocutor of the Lord Ordinary as found "That the liferenter's possession under her contract of marriage, was not to be considered the possession of Alexander Sutherland, the apparent heir, and that the pendicle of land possessed by the said Alexander, in pursuance of the contract of excambion, was not within the statute 1695."

Upon advising the former petition with answers, the Court (22d Nov. 1748,) found, "That the decrees of constitution (no renunciation being produced,) could have no other effect than as decrees *cognitionis causa*, and therefore could only affect those lands to which the debtor had a title established in his person." And, of the same date, upon advising the petition for the creditors, "Found no necessity to give any interlocutor upon this petition."

The Lord Ordinary (10 Dec.) decerned in terms of these interlocutors, and accordingly reduced the adjudications *quoad* the estate of Clyne. And thereafter, the Court, upon advising a petition to this effect for the respondents, with answers, "Re-

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1748. "called the sequestration granted over the estate
 SIR L. GRANT "of Clyne, &c."

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 Entered Jan.
 23, 1749.

The appeal was brought from the interlocutors, of the 22d November and 10th December 1748; the two interlocutors of the 4th January 1749, (and from so much of the interlocutor of the Lord Ordinary of the 24th December, 1747, as reduced the diligence of the creditors, with respect to the liferented lands, and the pendicle of land exchanged,*) praying that the same may be reversed, and that the interlocutors of the 14th June 1744, and 21st November 1746, may be affirmed.

Pleaded for the Appellants:—1. The appellants are acknowledged creditors of Alexander Sutherland, and have completed regular, and (in point of form) undisputed titles to his estate, in consequence whereof, they had, under the sequestration attained possession of the lands, of which the respondent could not justly deprive them by his bare right of apparency, without making up any title to the estate.

It is not agreeable either to law or equity, that a total want or defect of title should screen a party in possession of an estate, to the prejudice of onerous creditors, when the law points out a method to supply that want or defect; and the doing so would make the estate liable to the creditors.

By virtue of the act 1695, the respondent can in no shape complete his title to the lands in question, without subjecting them to the debts of his father. By the acts 1540 and 1621, the creditor

* It is stated in the appellant's case, but not in the Journals of the House of Lords, that the interlocutor of the 24th Dec. 1747 was appealed from as above.

may charge the heir either to enter or to renounce the lands liable to his demand. The defence here is just this, that the respondent will neither enter nor renounce; he renounces entering heir to his father, but if he enters to his grandfather, the estate is liable to his father's debt; he makes his election, therefore, to hold the land without a title, and defeat creditors in that way, because he can make up no title which will not subject the estate to their demands. The meaning of the law empowering a creditor to charge the heir to enter, is to make him pay the debt if he chooses to possess the fund which ought to satisfy them. The charge against the respondent is in respect of the lands, and not in respect of his being the son of his father; he ought, therefore, either to enter, in which case the land is liable, or give up the land. To say that he renounces the succession of his father, because in these lands he may enter to his grandfather, and then refuse to enter heir to his grandfather, because by so doing the lands would be rendered liable for the father's debts, is a gross evasion, and such as cannot be countenanced, to defeat onerous creditors, especially after the three acts of parliament have been made to prevent the frauds of heirs. The respondent, therefore cannot, on the ground of his minority, be relieved from the decrees pronounced on the head of lesion, because it cannot be accounted lesion that he should be prevented from practising fraud.

2. By the law of Scotland, the possession of a life-rentrix is deemed the possession of the heir entitled to the fee, and he makes up his titles in the same manner to life-rented lands as to lands which are

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not incumbered with a liferent, and they are equally liable for his debts. If Alexander Sutherland had completed his title to the estate, the liferented lands would unquestionably have been liable to his creditors after the death of the liferentrix; and as by the act 1695, estates possessed three years upon apparency are liable to the debts of the possessor, in the same manner as if he had made up titles, that part of the estate of Clyne liferented by his mother must, after his death, be attachable by the creditors, in the same manner that it would have been, if Alexander Sutherland had completed his titles.

Pleaded for the Respondent.—A pupil is in every case entitled to be restored against decrees pronounced against him through an omission of defence and want of a guardian, and to be put in the same state in which he would have been had he been properly defended; and if he had been so defended, no decree could have been pronounced other than *cognitionis causa*, and such could not be the foundation for adjudging any other estate than that which had been vested in the debtor.

The property of lands does not transmit *ipso jure* from the dead to the living, but remains *in hereditate jacente* of the person who died last vest and seised, until the heir for the time being establishes the proper titles in his own person; and by the common law no apparent heir can charge an estate with debt to which he has established no title by service and infeftment.

Previous to the act 1695, the possession of an apparent heir for any length of time did not subject the succeeding heir to the payment of such ancestor's debts. The former law is by that act so

far altered, that the debts of an apparent heir who has been in possession of an estate for three years, will affect the next heir *in valorem*, provided he is served heir to a remote ancestor, or possesses the estate under a trust adjudication upon his own bond. But the respondent does not stand in either of these situations, and is not therefore within the provision of that act any more than he would have been though served heir, if the possession of the interjected heir had not continued for three years.

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After hearing counsel, "it is ordered and adjudged, &c. that the said several interlocutors of the 22d November, 1748, the 10th December, 1748, and the two interlocutors of the 4th January, 1749, be, and the same are hereby reversed; and it is further ordered and adjudged, that the said interlocutor of the Lord Ordinary of the 24th December, 1747, be, and the same is hereby affirmed; and it is also ordered and adjudged, that the interlocutor of the said Lord Ordinary of the 21st November, 1746, so far as the same is not reversed or varied by the said interlocutor of the 24th December, 1747, be and the same is hereby affirmed."

Judgment,
May 11, 1749.

For Appellants—*W. Grant, W. Murray.*

For Respondents—*Alex. Lockhart, C. Erskine.*

This case seems to have been argued and decided on different grounds in the House of Lords from those decided in the Court of Session. Falconer says, (vol. ii. p. 15,) that "the arguments pled upon, (before the House of Peers,) as is related from good authority, were not those pled before the Court of Session, but that to possess an estate without making up titles, subjected the possessor, in virtue of the act 1695, to the debts of a former apparent heir who had possessed for three years."

Lord Elchies says, "The Lord Advocate told me it was upon the general point, that when the last apparent heir, the debtor,

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" was three years in possession, the next apparent heir is liable in
 " the same manner as if the debtor had been infeft, if he possesses ;
 " whether he passes him by, and serves to a remoter predecessor or
 " not, and that the Lords meant to extend the act 1695 further
 " than we thought we could do, and further than we did in the cases
 " of Lord Banff, &c." (9810, 9815.)

Lord Kames says, " This cause was carried by appeal to the House
 " of Lords, and was debated two full days. The Chancellor observ-
 " ed that their notions in England about what we call correctory laws,
 " differ widely from ours. Penal laws, he admitted, are to be strictly
 " interpreted ; but where a remedy is provided by a statute to supply
 " a wrong or defect in common law, it was, he said, an established
 " rule in England, that the judges ought to supply every defect in
 " such a statute, and to complete the remedy intended by the legis-
 " lature, that they ought to regulate their judgments by the spirit
 " and meaning of the statute, without allowing themselves to be li-
 " mited by the precise words.

" According to this rule of interpreting correctory laws, which ap-
 " pears exceedingly rational, our judges have done wrong in refusing
 " to apply the act 1695 against an heir apparent, who in order to evade
 " the law, contents himself with possession without passing by and
 " making up titles. The legislature undoubtedly intended a complete
 " remedy for the disease, and the remedy is imperfect if the apparent
 " heir can possess the estate without acknowledging the debts of the
 " interjected heir apparent. According to the said rule, our judges
 " may and ought to supply what is defective in the words of the sta-
 " tute, and to complete the remedy according to its spirit and inten-
 " tion.

" The decree was reversed, and the decrees of constitution and ad-
 " judication were sustained with regard to the estate of Clyne, as
 " well as with regard to the estate of Kinminity. It was the opinion
 " of the House, that the heir of Kinminity was not enabled to pos-
 " sess the estate of Clyne without being liable for his father's debts,
 " and therefore that he could not specify lesion, in suffering the estate
 " of Clyne to be adjudged by his father's creditors."

Vide Bankton, III, 5. § 106. Grant v. Sutherland of Pronsie,
 12th Dec. 1754. (9819.)

JOHN CAMPBELL,	-	-	<i>Appellant;</i>	1749.
SIR PETER HALKET,	-	-	<i>Respondent.</i>	CAMPBELL v. HALKET.

21st April, 1749.

PRESUMPTION.—VICENNIAL PRESCRIPTION.—An action being raised, after the lapse of nearly forty years, partly on a general claim for money had and received, and partly on a writing importing to be a receipt of money for the behoof of another, found that under the circumstances of the case, the claim must be presumed to have been extinguished.

[Mor. p. 11,634. Elchies voce Prescription, No. 29; Falc.]

JOHN, Earl of Breadalbane, for certain services per. No. 81. formed by him, in 1688, obtained from the privy council of Scotland a recommendation to the Lords of the 'Treasury, for the payment of the sum of L.300, for defraying his expenses.

Sir Patrick Murray was then receiver-general, and continued so till 1693.

The recommendation of the privy council was delivered to Sir Patrick Murray by Lord Breadalbane, who wrote at the bottom of it the following receipt,—“ Received by me, from Sir Patrick Murray, the contents of the above written order,”—signed, “ Breadalbane,”—but this receipt bears no date.

On the other hand, Sir Patrick granted the following acknowledgment to Lord Breadalbane,—‘ I, Sir Patrick Murray, his Majesty’s receiver-general, grant me to have received from the Earl of Breadalbane a recommendation from the Lords of his Majesty’s council to the Lords of the Treasury, for giving the said Earl L.300, for the causes therein

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' mentioned, dated December, 1688 ; which L.300
 ' I now having stated in my accounts ; therefore I
 ' shall oblige me, when the same is allowed to me
 ' and approved by the auditors, that I shall there-
 " after pay in the L.300 to the said Earl," &c. dated
 3d Jan. 1693. He was removed from his office of
 receiver-general the same year ; but in his ac-
 counts, which were audited in 1696, the following
 article is allowed :—" Paid to the Earl of Breadal-
 bane, L.300," &c.

The Earl of Breadalbane died in 1717 ; and in
 1736, his son, the then Earl, made a claim for this
 sum upon Sir Peter Halket, the representative of
 Sir Patrick, and founded upon the above receipt,
 and the allowance of the sum by the auditors in
 1696. The matter was submitted to arbitration ;
 but no award having been made, the Earl after-
 wards assigned his interest to Mr. Campbell (the
 appellant), who then brought his action against
 Sir Peter (the respondent) for the above sum, as
 money received by Sir Patrick Murray for the use
 of the late Earl.

The respondent, in his defence, *inter alia*, plead-
 ed the vicennial prescription, in virtue of the act
 1669, with regard to holograph writings. The Lord
 Ordinary (Minto), 24th July 1744, sustained this
 defence, and afterwards adhered, (12th Dec. 1744.)
 Upon advising reclaiming petition and answers, the
 Court adhered to the interlocutor of the Lord Or-
 dinary.

The appellant again reclaimed, and pleaded that
 this action was not barred by the act, 1669. For
 that Sir Patrick's writing, founded on the Earl's
 receipt, is neither a missive letter, a bond, nor sub-

scription in an account book; and that the statute does not generally enact that all holograph writings whatever shall prescribe after twenty years; and being a correcting law, it must be strictly interpreted. It was farther contended, that the appellant's demand was not founded upon Sir Patrick Murray's holograph writing and receipt, but was for money had and received by Sir Patrick for the Earl of Breadalbane's use in 1696, three years after the date of Sir Patrick's obligation, and that the only use of this obligation was to show that the receipt granted to the Earl was not for money received *at the time*, but that it was given *spe nume-randæ pecuniæ*; and no reason could be given that the Earl's receipt should give a perpetual defence to Sir Patrick, but that Sir Patrick's should not afford a perpetual reply to the Earl—that in these circumstances, the long prescription of forty years was the only prescription pleadable against his demand, and this prescription was effectually interrupted by the reference to arbitration in 1736.

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The Court, (February 19, 1747,) found, "That the holograph receipt and obligation founded on is probative of the facts therein contained."

But upon advising a petition for the respondent, with answers, their Lordships, upon considering the whole circumstances of the case, found (3d June 1747,) "that now no action does lie for the sum pursued for," and they adhered (21st July).

The appeal was brought from "several inter-^{Entered Feb. 1, 1749.}locutors of the Lord Ordinary and Lords of Session, the last dated the 21st July 1747."

Pleaded for the Appellant:—1. It is evident, from the nature and circumstances of the transaction, that no money was paid to the Earl by Sir Patrick

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Murray, at the time the article was stated in his accounts with the treasury ; and it is equally evident that the Earl had given Sir Patrick his receipt before the article was or could be so stated.

2. Sir Patrick did not become indebted to the Earl by granting his receipt or declaration of 1693, for notwithstanding this, it was possible that he never might be indebted to the Earl. He only became indebted by the article being allowed in his accounts, in Dec. 1696, and by his having public money in his hands at that time, to make it good ; and this would have made him liable to account to the Earl for so much money had and received for the Earl's use, although he had not granted the obligation in 1693;—the effect of which was only to show, that the receipt then given by the Earl was to answer a particular purpose, but not to serve as a voucher for Sir Patrick against the Earl.

3. As the appellant's claim is not founded upon Sir Patrick's receipt in 1693, but upon these two circumstances, viz. The article being allowed by the treasury in 1696, and Sir Patrick having public money in his hands to answer it, it could not fall under the vicennial prescription ; nor is it reasonable that Sir Patrick's receipt, which was only intended to qualify the one granted by the Earl, should ever prescribe while that one could subsist.

4. The long taciturnity cannot create a presumption that the money was paid, in opposition to the written and real evidence arising from the circumstances of the case. The mere recommendation by the Privy Council, unless supported by a warrant from the Treasury, was no authority for Sir Patrick to pay ; and the Earl could not have known that

the article was allowed, unless notice of this was given to him; and there is no evidence that Sir Patrick, who was the only person who could afford him this information, ever gave it to him. On the contrary, it may be presumed that he would be in no hurry to give it, when it appears that, upon passing his accounts in 1696, the Treasury made Sir Patrick several thousand pounds indebted to the public.

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Pleaded for the Respondent.—This action is clearly founded upon Sir Patrick's receipt in 1693, and therefore no demand having been made upon it for the space of twenty years, the present action is barred by the act 1669.

2. As the Earl, by his receipt, acknowledged payment of the L.300 from Sir Patrick, and as the same was stated at the settlement of accounts in 1696 to have been paid by Sir Patrick to the Earl, this was full and legal proof in a question with the Earl, or with any one claiming under him, that the money had been actually so paid and received.

3. There is no evidence, nor reason to presume, that this receipt of the Earl's had been granted *spe numerandæ pecuniæ*, as necessary to furnish Sir Patrick with a voucher for that article in his accounts.

4. Neither can it be presumed that the Earl could look upon this as a debt justly due either by the Treasury or by Sir Patrick, no demand having been made for so many years for recovering the sum, though provision was made by law for payment of all the public debts.

The appellant, or those under whom he claims, have themselves to blame, if any doubt arises in ascertaining the true matter of fact, by their delay

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Judgment,
 April 21,
 1749.

and neglect in bringing the action, or making any demand, for so many years after the death of the parties originally concerned, and of all others who could have thrown any light upon those matters.

After hearing counsel, "it is ordered and adjudged, &c. that the said petition and appeal be "and is hereby dismissed this House; and that the "several interlocutors complained of be, and the "same are, hereby affirmed."

For Appellant, *William Grant, C. Erskine.*

For Respondent, *W. Murray, Alexander Lockhart.*

AGNES STEWART and HUSBAND,	-	<i>Appellants;</i>
CHRISTIAN HERON,	- -	<i>Respondent.</i>

30th May, 1749.

PERSONAL AND REAL.—BONA ET MALA FIDES.—An onerous singular successor is not affected by a latent and personal ground of challenge, to which his author's right is subject.

[*Elchies voce Fraud*, No. 21, Mor. 1705.] •

No. 82. THE entail of the lands of Physgill having been set aside as being *contra fidem tabularum nuptialium*, (*supra* No. 71), and Agnes Stewart, the heir under the marriage contract, having been found entitled to the estate, and having entered into possession of it, the present question arose between her and her husband (the appellants) on the one part, and Christian Heron (the respondent) widow of the heir of entail, whose right had been set aside, on the other. During the life-

time of her husband, and while the feudal title which he had made up to the lands of Physgil under the entail of 1719, remained unchallenged, the respondent had been infeft by him in a liferent annuity out of these lands, in virtue of an obligation contained in their marriage contract.

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In order to establish her right to this annuity, upon the death of her husband, the respondent raised an action of poinding the ground before the Sheriff of the county, against the tenants of the lands, upon her liferent infeftment, which, having been removed into the Court of Session, was converted into an action of mails and duties against Agnes Stewart and her husband, and the tenants. The Lord Ordinary (Kilkerran) reported the case to the Court, and their Lordships found, (9th February 1749) “ That the obligation entered into by John Coltraine, (afterwards John Stewart of Phisgill,) “ in the marriage settlement betwixt him and the “ pursuer, whereby he was bound to settle upon “ her a liferent provision to the extent of L.50 “ Sterling yearly, was onerous on the part of the “ said pursuer, and rational upon the part of the “ said John Coltraine ; and that, he having implemented the same, by granting the liferent infeftment to that extent, when he was in the right of “ the fee and property of the estate of Phisgill, and “ his right subject to no challenge from any thing “ that did or could appear on the records ; That “ infeftment was likewise just and onerous, and “ does subsist in her person, notwithstanding of the “ reduction afterwards brought against the right “ and title of the said John Coltraine, upon the latent personal obligation contained in the contract “ of marriage entered into, *Anno* 1668, betwixt

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“ John Stewart, writer in Edinburgh, and Agnes Stewart his spouse, whereby he was bound to settle the estate he should acquire in favour of the heir whomsoever of the marriage, and notwithstanding the decree obtained in that reduction, setting aside the right of the said John Coltraine, which the Lords found cannot hurt the said onerous liferent settlement made to the pursuer by her said husband, while he stood in the full right of property of the estate conform to the infeftments and investitures thereof.” The Court adhered (22 Feb.)

Entered,
 March 2, 1749.

The appeal was brought from these interlocutors of 9 and 22 Feb. 1749.

Pleaded for the Appellants :—The claim of the respondent is barred, *re judicata*, in consequence of the judgment in the former action, John Coltraine her husband having urged in her right, as well as in his own, the same arguments which are now maintained: At all events, the judgment in the former cause is a strong precedent upon the point in dispute in the present question. The entail 1719, which is the foundation of the respondent's claim, being reduced and set aside, as fraudulent, and *contra fidem tabularum nuptialium*, all subsequent rights dependent thereon must fall according to the rule, *resoluto jure dantis resolvitur jus accipientis*.

John Stewart (the entailer) being infeft in his wife's estate, upon the disposition contained in their contract of marriage, 1668, and his infeftment being duly recorded in the proper register, every person contracting upon the faith of these records must thence have discovered, that the estate was limited and secured to the heir of the marriage,

and consequently, that John Stewart was thereby disabled from granting any voluntary gratuitous deed, to the prejudice, and in fraud of that marriage settlement.

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Therefore the respondent's claim as a *bona fide* purchaser, upon the faith of the records, is without any proper foundation. The entail 1719, was her husband's only title to the estate; that was plainly a gratuitous voluntary deed of settlement by John Stewart, without any just or necessary cause, in fraud of his own marriage contract. John Stewart's infeftment 1668, proceeding upon the marriage contract, did clearly point out the limitations he was under in favour of the heir of that marriage, and it is an established point, that the most onerous purchaser from one whose right appears *ex facie*, or is by law presumed to be gratuitous, (as in deeds between conjunct and confident persons,) can be in no better case than the person from whom he purchases.

Pleaded for the Respondent:—John Coltraine, the respondent's husband, at the time of granting the liferent provision to her, was in full possession of the estate, and had the property thereof legally and completely vested in him, so that in point of law nothing can be clearer, than that, notwithstanding any previous latent obligations, he might have sold the estate to a purchaser for a valuable consideration, and would have forfeited the same in case he had been guilty of any act, incurring a forfeiture.

The respondent was truly a purchaser of her liferent provision for a full and valuable consideration, without any notice of the said contract of 1668.

Although the entail was reduced by reason of

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the contract of 1668, yet, that personal contract cannot affect the right of a purchaser, not having notice of it, who claims under a deed executed by a subsequent heir of entail, while he was in the undisputed possession of the estate, under a title then unimpeached; and which appeared, from all the entries upon record, to be liable to no objection.

Judgment,
 30 May 1749.

After hearing counsel. "It is ordered and adjudged, &c. that the interlocutor complained of be affirmed."

For Appellants, *W. Murray, A. Lockhart, C. Maitland.*

For Respondent, *A. Hume Campbell, C. Erskine.*

MARGARET CAMPBELL and HUSBAND }
 and OTHERS (daughters of Archibald Campbell of Shirvane,) } *Appellants.*
 ALEX. CAMPBELL of Shirvane, } *Respondent.*

1st June 1749.

HEIR and EXECUTOR.—Where the real and personal estate are conveyed to different heirs in virtue of different deeds, each containing a general clause, obliging the persons favoured, to pay all the granter's debts—Held, that such clauses do not alter the ordinary rules of liability between heir and executor.

[*Elchies, Voe & Tailzie No. 31. Kilk. p. 231. Falc. Mor. 5213.*]

No. 83. ARCHIBALD CAMPBELL of Shirvane, granted a conveyance (28 May 1733) of his executory and

personal estate in favour of his eldest lawful son Dougal, and the heirs-male of his body; whom failing, to such person as he himself should appoint by writing under his hand; whom failing, "to his own nearest heir-male;" and the heirs so succeeding were taken bound to pay "the respective portions and provisions provided, or to be provided, by him, to his other children, and also to satisfy and pay his just and lawful debts and legacies, and the expences of his funeral, &c.

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A few days thereafter, (8 June,) he likewise executed an entail of his estate of Shirvane in favour of himself, and of the same son Dougal, and the heirs of his body—(with other substitutions)—whom failing, in favour of Alexander Campbell, (the respondent,) his eldest natural son. In this deed likewise, it was declared that the heirs so succeeding, "Shall be holden and obliged to pay the portions and provisions of my other children, &c. and that the lands shall not only be burdened with the payment thereof, &c. but with the payment of all debts that shall be due by me at the time of my decease, &c. all which," &c. the said heirs "shall be holden by acceptance of this right to perform and fulfil, albeit the said bonds and obligations be only personal, and no infestment has followed thereon."

Archibald died in 1737, and his son Dougal having died soon after, without issue, the succession to the estate of Shirvane opened to the respondent, and the personal estate accrued to Dougal Campbell of Kilmartin, as the next heir-male of Archibald.

Thereafter Kilmartin, in implement of a transaction with the daughters of Archibald, (the ap-

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pellants,) disposed to them his whole right to the personal estate. They then paid some of the debts due by their father, and afterwards, in the character of executors of their father, and as assignees of Kilmartin, they brought an action of relief against the respondent, in which they insisted that, in virtue of the clause in the settlement of Shirvane, they are entitled to reimbursement of what they had already paid, and to relief from any other demands which might be made against them by the other creditors of their father.

The defence was chiefly rested upon the previous disposition of the personal estate, whereby that was also burdened with the payment of the debts.

The Lord Ordinary (Kilkerran) sustained the defences, and decerned, (27 Nov. 1744,) but afterwards took the case to report to the Court on informations.

Their Lordships, by their interlocutor, (14 June 1747) found, "that relief of the debts of the tailzier is competent to the pursuers, in the right of Campbell of Kilmartin, against the defender, the heir of tailzie in the land estate." But upon advising a petition and answers, (17 Feb. 1747) they altered the interlocutor, and "found that relief of the debts of the tailzier is not competent to the pursuers in the right of Campbell of Kilmartin against the defender, the heir of tailzie in the land estate,"—and (12 June) adhered.

Entered,
 11 Jan. 1748.

The appeal was brought from these interlocutors of 17 Feb. and 12 June 1747.

*Pleaded for the Appellants:—*The testator had full power to dispose of his real and personal estate to such persons, and under such conditions as he

thought proper. He could not defeat the right of his creditors, but he might subject either his real or his personal estate in the payment of his debts. Which of those he has subjected must depend upon his acts. And by the last deed executed by him, whereby he excluded his heir-male, he conveyed his real estate, upon the express condition that the heirs under that deed should pay all his debts. To contend that the personal estate, which was given to the heir-male, is in these circumstances liable to pay the debts, and not the real, is to maintain that the heirs nominated in the deed of tailzie are entitled to take the estate under the settlement, and to reject the conditions upon which it was given. Besides the intention of the testator to subject the heirs in the real estate to the payment of his debts, is clearly demonstrated by the declaration that they shall be so liable, "albeit the said bonds and obligations be only personal, and no infestment has followed thereon;" and this was a reasonable satisfaction to the heirs of his family whom he was disinheriting, in order to provide for his illegitimate offspring.

*Pleaded for the Respondent:—*The debts in question are such as by their own nature, and by the common and statute law of Scotland, ought to be paid out of the executry or personal estate of the original debtor, who, by the clause obliging the heirs in his tailzied estate to pay all his debts, intended merely to provide an express security for his creditors, or to furnish them with a more prompt and easy remedy to recover payment of their debts, but not to alter the ordinary rules of liability between the heir and executor. That the bare charging the heir in a real estate with

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the disponent's debts, and empowering him to sell land for payment thereof, are not sufficient to discharge the personal estate, or to bar the heir's relief out of the executry of the personal debts, which stand so charged upon him, was decided by the Court in Jan. 1745.*

Besides, in the present case, there was an express settlement made by the testator of his personal estate, whereby part of his property was also expressly burdened with the payment of his whole debts, and thus both estates being *in pari casu* in respect to the burdens with which they were charged, the question concerning the relief stood in the same situation as if neither the one nor the other had contained any such declaration, namely, that the moveable estate should be ultimately charged with the payment of the moveable, and the real estate with the heritable debts, if there were any.

Judgment,
 1 June 1749.

After hearing counsel, "It is ordered and adjudged, &c. that the interlocutors complained of be affirmed."

For Appellants, *A. Hume Campbell, C. Erskine.*
 For Respondent, *W. Grant, W. Murray, Will. Robertson.*

Elchies states erroneously that the judgment was reversed.

* Russel v. Russel. Mor. 5211.

FRANCIS SCOTT, - - - *Appellant*;
FRANCIS, LORD NAPIER, *et alii.* - *Respondents.*

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29 November, 1749.

WITNESS.—EXHIBITION.—ADVOCATE.—A defender being cited upon a general diligence against havers, is not obliged to depone or exhibit except upon a special condescendence of the writs called for.

A defender being cited under a diligence against havers for proving a trust, found that he is not bound to produce the writs specially condescended upon, if he depone that they contain no clause instructing a trust.

Found that lawyers and agents cited as havers, are bound to answer only such interrogatories touching writings that have come to their knowledge in the course of their employment, as might competently be put to their clients.

PROCESS.—APPEAL.—A pursuer having judicially passed from the defender's oath, and an interlocutor being in consequence pronounced circumducing the term; it was found to be incompetent to appeal from previous interlocutors relating to the defender's deponing upon and exhibiting the writings called for.*

[Elchies, *voce* Witness No. 3 and 5. Cl. Home. Mor. 358 and 3965.]

LORD Napier being pursued by Scott in a pro- No. 84. cess of reduction, improbation, and declarator, for setting aside his right and titles to the lands of Thirlestane and others, produced a complete feudal title by charter and sasine, upon which he averred that prescription had run. The pursuer alleged interruption, and that the lands had been originally

* In this way it appears that the House of Lords did not decide upon the other points noticed above. *Vide* Judgment.

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acquired by Lord Napier's authors in trust, and upon a redeemable right ; and a diligence having been granted by the Lord Ordinary (Polton) against havers in support of this plea, was executed against the defender himself, who was required to "de-
" pone and exhibit all writings that concerned the
" estate of Thirlestane, and which might tend to
" prove interruption of the prescription, or the
" terms of the trust in the person of Patrick Scott
" of Tanlawhill, or continuance thereof, or other
" transactions relating to the pursuer's right to the
" estate."

Lord Napier having refused to depone, the Lord Ordinary, (Murbile, 9 February 1734,) found,
" That the original right in Tanlawhill's person,
" who was the Lord Napier's predecessor, though
" in the form of an absolute disposition from Scott
" of Harden to the wadsetter, with consent of Sir
" John Scott of Thirlestane, the pursuer's grand-
" father, was qualified by the declarations produc-
" ed to have been originally a trust right for
" Thirlestane's behoof, for security to Tanlawhill
" of 44,000 merks, thereby declared to have been
" all that was paid to Harden the wadsetter ; and
" therefore, that the Lord Napier must depone and
" exhibit every writ passed between these parties'
" predecessors that may serve to interrupt the pre-
" scription, or instruct the terms of the trust, and
" particularly," &c. &c. " And in general every
" writ of whatever kind which may serve to inter-
" rupt prescription, or prove the continuance of
" his predecessor's trust."

But the case being afterwards reported, the Lords found, (26 June and 18 November 1735,) " That the Lord Napier is only obliged to depone

“ upon a particular condescendence of writs craved
 “ to be exhibited to instruct the alleged trust, or
 “ the alleged continuance thereof, or the alleged
 “ interruptions of the prescription ; and that he is
 “ not obliged to depone in general.”

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The pursuer next insisted that the lawyers and agents employed by Lord Napier should be examined touching such writings as related to the premises, upon a general interrogatory, as other havers. The Lords upon report found, (16 Feb. and 12 July 1737,) “ There can be no interrogations put to the lawyers and agents employed by the Lord Napier or his predecessors, as to such writings as they had come to the knowledge of in the course of their employment ; but such as are competent to be put to the Lord Napier by the Lords’ interlocutor in presence.”

Several interlocutors were thereafter pronounced restricting the interrogatories proposed to be put to Lord Napier. *Inter alia*, The Lords found, (22 July 1740,) “ the Lord Napier is obliged to depone whether the conveyances condescended on contain any clause instructing a trust or not, and in case he acknowledge they do contain any such clause, he is bound to exhibit, but if he depone they contain no such clause of trust, that he is not bound to exhibit them.”

The pursuer conceiving that he could derive no advantage from the oath when so limited, judicially passed from the same, (28 November 1740) ; whereupon the Lord Ordinary, (29 November,) “ in respect of the pursuer’s procurators judicially passing from my Lord Napier’s oath, found that he could not be holden to depone thereafter ;” and circumduced the term accordingly. The parties were

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Entered,
13 Dec. 1748;
26 April and
9 June 1749.

then heard upon the proof and whole case, and judgment was pronounced upon the merits.

The appeal was brought from the interlocutors of the 26 June, 18 November, 10 and 19 December 1735; 9 January 1736; 16 February and 12 July 1737; 3 July and 29 November 1739; 22 and 29 July, and 23 November 1740; 15 December 1742; 5 January, and 2 December 1743; 18 and 20 January 1744.

Pleaded for the Appellant:—The several judgments refusing to examine the respondent on general interrogatories, and requiring a condescendence of the particular writings, which in the circumstances of the case it was impossible for the appellant to give, were contrary to law; since it being admitted that a defender, by the law of Scotland, is bound to exhibit writings particularly condescended upon, it follows that he must exhibit other writings tending to support the pursuer's claim, even upon a general interrogatory, more especially in a case like the present, where the trustee must be presumed to have in his possession such writings.

Although it is true that bonds or other *instrumenta apud debitorem reperta*, could create no obligation upon him, yet such documents would be good evidence that there had been such obligation, sufficient to determine the nature of other rights and transactions.

The rule of the civil law, *nemo tenetur edere instrumenta contra se*, does not take place in the law of Scotland, as is plain from the proceedings in the present action; the Court having obliged the respondent to depone and exhibit all writings against himself upon a particular condescendence thereof;

and there is the same reason for exhibiting upon a general interrogatory. Indeed, in some cases, the defender is bound to exhibit all writs whatever, in which the pursuer may have any interest, as in exhibitions *ad deliberandum*, at the instance of an apparent heir; and the adjudication which founds the present action, being led against the appellant, the apparent heir, for his own behoof, it is of the like kind with an exhibition *ad deliberandum*; or at least it ought to have the same privilege, especially against his trustee, in order to discover matters relative to the trust.

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Pleaded for the Respondent:—Although the law of Scotland does give a right to a party who hath *prima facie* a title to the lands, by an action of reduction improbation, to compel the production of all deeds and incumbrances which may affect the same, and in case they are not produced, to have them declared void; yet it is equally certain that a defender in such an action, producing a title preferable to the pursuer's, is held to exclude him, and is thereupon assoilzied from the action. The pursuer, in such a case, cannot supply his want of title, or enforce a further production, by alleging that the defender's title, sufficient in law, is vested in him in trust, unless the reality of such trust, and that it still subsists, be first proved. And this rule is applicable in the strongest manner to the present case, where the lands have been possessed upon proper legal titles of absolute property, for a century, and no notice ever taken of this pretended trust.

The appellant's demand was quite irregular and unprecedented, compelling the respondent to depone *in jure*, and not *in facto*,—not whether he

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had this or that writing particularly described, but whether he had any writings which, in his own opinion, might serve the appellant's purpose of making out a better title to the estate. Not being a lawyer, he could not do this upon his own judgment, and to do it with the assistance of another, would be attended with excessive difficulty and expense.

Supposing even the most proper and direct evidence of a trust were to be discovered by a search among the respondent's writings, such as a declaration, backbond, or obligation to denude, it could avail nothing, any more than a bond for a sum of money, by reason of the maxim, *quod instrumentum apud debitorem repertum, presumitur solutum*.

Judgment,
Nov. 29, 1749.

After hearing counsel, "it is declared, &c. That "it appears that on the 28 November 1740, the "appellant's procurator did, before the Lord Ordinary, judicially pass from the respondent, the Lord "Napier's oath, and consented in Court, that the "term for proving and producing might be circumduced against the appellant conditionally, if "he should not prove and produce further betwixt "and that day eight days; whereupon, by the interlocutor of the 29th of the said November, the "term was circumduced accordingly: It is therefore ordered, that so much of the said appeal as "complaints of the several interlocutors, relating to "the respondents, deponing upon, exhibiting, or "producing any deeds, writs, or instruments of any "kind, be dismissed: And it is further ordered "and adjudged, that the rest of the interlocutors

"complained of in and by the said appeal be affirmed, and the said appeal dismissed."

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DUKE OF HAMILTON, &c.

v.

DUKE OF HAMILTON'S CREDITORS.

For Appellant, *C. Maitland, C. Erskine.*

For Lord Napier, (Respondent,) *William Grant, W. Murray, A. Hume Campbell.*

JAMES, Duke of HAMILTON, *et alii*, - Appellants.
 THOMAS, Earl of HADDINGTON, *et alii*, CREDITORS of JAMES, Duke of HAMILTON, deceased, - - Respondents.

16th January 1750.

TRUST.—JUS TERTII.—A trust for payment of such of the creditors of the grantor's son, as the trustees should agree and compound with, and declaring that no action or diligence thereon should be competent to any of the creditors, but, on the contrary, that they should thereby forfeit all interest in the same; and the trustees having for a length of time taken no steps towards a distribution,—action was sustained at the instance of the whole creditors, for the purpose of calling the trustees to account for their intromissions with the trust estate. Action being raised against the representatives of the original trustees, without opposition from the substitute trustee, it was found to be *jus tertii* to the representatives to object the above forfeiting clause.

[Elchies voce Trust, No. 9 and 13.—Fal.—Mor. 16201.]

ANNE, Duchess of Hamilton, in her own right, No. 85.
 had a claim upon the crown of France for 500,000
 livres, as arrears of rent from the Duchy of Chatle-

1750.

DUKE OF HAM-
MILTON, &c.
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DUKE OF HAM-
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herault, secured by the treaty of Utrecht. Her son, Duke James, having predeceased her, leaving large debts, she, in 1715, executed a trust-disposition of this sum in favour of Charles Earl of Selkirk, and Mr. Hamilton of Pencaitland, and the survivor of them, whom failing, James Duke of Hamilton, her grandson, and his heirs of tailzie, *first*, for paying her own debts; "in the *next* place, for payment of such of the " said deceased James Duke of Hamilton, his creditors, &c. as she should appoint by a writ under " her hand ; and failing thereof, to such of the said " creditors as the said trustees should compound " and agree with ; and with power to them to prefer any one of the said creditors as they shall " think fit." " Providing always that the present " clause in favour of the said creditors shall afford " no right to them, or either of them, to affect the " subject hereby disposed, or to pursue any action " thereupon against the said trustees ; and if any " such diligence be used, or action raised and prosecuted upon the same, the foresaid diligence, and " also the foresaid provision, in so far as it was in favour of the said creditors so using diligence, are " hereby declared to be void and null." Further, " full power and liberty is reserved to the said " trustees to prefer any of the said" creditors, " and " they are not to be accountable" to the said creditors, " for what they shall act or do as to the " preference," &c.

By virtue of a reserved power to burden the entailed estate to the amount of L.20,000, she, at the same time, executed a conveyance of certain of the lands in security of that sum, in favour of the same trustees, for the same purposes, and under the same conditions as above recited.

The Duchess died shortly after executing these deeds, and the original trustees likewise dying without having paid off any of the debts, the creditors of her son brought two actions, the one of count and reckoning against the representatives of these trustees, concluding for payment of their debts out of the trust estates; and the other against the Duke of Hamilton, as substitute trustee. The Duke judicially declared, "that he did not oppose the creditors of the late Duke, his father, their getting payment of their debts out of the subject of the French estate."

1750.
DUKE OF HAM-
MILTON, &c.
v.
DUKE OF HAM-
MILTON'S
CREDITORS.

The representatives of the trustees pleaded,
1. That the pursuers had no interest in the trust deeds, which were confined to such creditors as the Duchess should appoint, by a writing under her hand; and in default thereof, to such as the trustees should compound and agree with; under neither of which descriptions the pursuers could claim. 2. That even though the pursuers had an interest in the trust deeds, yet, by the above recited clause, they had forfeited that right by bringing the present action.

It was answered, 1. That the payment of her son's debts appeared, from the very words of the trust deeds, to have been the principal object of the Duchess in making them; but (not knowing the extent of these debts, or how much the French fund might produce) she had vested the trustees with discretionary powers to prevent the estate from being torn to pieces by legal diligences, and in case of a deficiency, to give a preference to such debts as might appear to them to merit it; but that it could never have been her intention to give the trustees a power of disappointing

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 DUKE OF HA-
 MILTON, &c.
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 CREDITORS.

the whole effect of the deeds, by denying payment to all the creditors. That the very forfeiting clause on which the defenders relied, proved plainly that the whole body of the creditors had an interest in the provision, since it would have been absurd to make any one, or a number of them, forfeit that which they never had. At all events, the creditors had a right to be compounded and agreed with, which had not been done with any one of them.

2. That the import of the forfeiting clause was entirely mistaken. It prohibits "diligence affecting" the subject of the trust, and action upon such "diligence," which was a proper caution to prevent the creditors from attaching the estate by real execution, and thus dispossessing the trustees, or embarrassing the object of the trust. But this very caution supposed steps to be taken by the trustees for the execution of the trust, and never meant to exclude all action at the creditors' instance against the trustees, if they acted contrary to its very essence, and put the trust money in their pockets. It must have been an extraordinary deed to let in such contradictory consequences. At the creation of these trust rights, the extent both of the funds and of the debts was uncertain. With a view to these uncertainties the power of compounding with the creditors was given to the trustees; which power, as it might have been frustrated by some of the creditors obtaining preference by legal diligence, was secured by the clause in question, which is merely executory of the former; and if even applicable to the case of creditors attacking with process the trustees, while endeavouring to convert the funds for the creditors' satisfaction, could not apply to that of the whole body of creditors seek-

ing, after 30 years' patience, an account of the trust funds. In short, the question was, whether the trustees under the deeds are bound to account for their intromissions, or whether the disposition was made to them, not as trustees, but for their own use and behoof.

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DUKE OF HAM-
MILTON, &c.
v.
DUKE OF HAM-
MILTON'S
CREDITORS.

The case being reported, the Court (19 Nov. 1740) "having considered the disposition, &c. "and compearance made for the Duke, whereby "he declared, that he did not oppose the creditors "their getting payment of their debts out of the "subject of the French estate; find that the action "is competent to the pursuers against the defen- "ders, and sustain the pursuers' title accordingly."

The Duke having died, the trust devolved upon the appellant, (his successor,) whereupon the defenders pleaded, in a reclaiming petition, that the late Duke's consent, on which the above interlocutor had been mainly pleaded, died with him, and could not bind the present Duke, from whom no consent to the action had been obtained.

Answered, That as the present Duke was a party to, and did not oppose, the action, it was *jus tertii* for these representatives to plead upon the forfeiting clause. The Lord Ordinary (10 July 1745) "In respect the present Duke, who is called "in the process, did not appear to oppose the pur- "suers, calling the representatives of the trustees "to account for their intromissions; and that the "Lords have found action competent to the pur- "suers: found that it was *jus tertii* to the repre- "sentatives of the trustees to found upon the irri- "tant clause in the said disposition, and therefore "repelled the defence founded thereon," &c.

The pursuers then insisted in their action against

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 DUKE OF HAM-
 MILTON, &c.
 v.
 DUKE OF HAM-
 MILTON'S
 CREDITORS.

the Duke, and craved that the execution of the trust having now devolved upon him, he might, as substitute trustee and possessor of the estate of Avondale, be ordained to account for the L.20,000 with which that estate was burdened by the second disposition above narrated. To which it was answered, (in addition to the plea founded on the forfeiting clause in the deed,) that neither the original nor the substitute trustees were bound to accept of, or after their acceptance, to proceed further than they should think fit in the execution of the trust, being by the deed expressly liable for intromissions only; that the Duke had not accepted of the trust deed, neither had he intromitted with the subject by virtue thereof; but that his father having died in possession of those subjects as heir of entail, he himself had taken them as heir of his father, and not as trustee of Duchess Ann, and that he was under no obligation to give up this title and take under the trust deed, seeing the trustees were left at full liberty to proceed in the prosecution of the trust so far only as they should think fit.

The Lord Ordinary (Drummore) having reported the case upon informations, the Court (25 Nov. 1747) "Find that action is competent at the instance of the creditors against the present Duke of Hamilton, the defender, and remit to the Lord Ordinary to proceed accordingly." And, on the same day, upon advising a petition in the other action, they found, "that action is competent at the instance of the creditors against the representatives of the original trustees, and remit," &c.

Entered, 13,
 March 1749.

The appeal was brought from "certain interlocutors, or parts thereof, the last dated 22d Feb. 1749."

After hearing counsel, "It is ordered and ad-
 " judged, &c. that in the first interlocutor pro-
 " nounced the 25 Nov. 1747 complained of, after
 " the word ['trustees'], and before the words
 " ['and remit'], these words be there inserted;
 " *videlicet*, ['and sustain the pursuers' title, ac-
 " cording to the terms and effect of the respective
 " dispositions executed by the late Duchess of
 " 'Hamilton']; and that, in the other interlocu-
 " tor of the said 25 Nov. 1747, after the word
 " ['defender'], and before the words ['and re-
 " mit'], the above mentioned words be there like-
 " wise inserted, *videlicet*, ['and sustain the pur-
 " suers' title, according to the terms and effect
 " of the respective dispositions executed by the
 " late Duchess of Hamilton']; and it is hereby
 " further ordered and adjudged, that with these
 " additions the said several interlocutors complained
 " of be, and the same are hereby affirmed."

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 DUKE OF HA-
 MILTON, &c.
 v.
 DUKE OF HA-
 MILTON'S
 CREDITORS.

Judgment,
 Jan. 16, 1750.

For Duke of Hamilton (Appellant), *W. Murray*,
C. Yorke.

For Countess of Cassilis, &c. (Appellants), *Wil-*
liam Grant, Paul Jodrell.

For Respondents, *A. Hume Campbell, Al.*
Forester.

1740.

BAYNES, &c.
v.
EARL OF SUTHERLAND.

WALTER BAYNE, Esq. and PENELOPE his Wife, and GEORGE MORRISON, Esq. } *Appellants.*
WILLIAM, Earl of SUTHERLAND, } *Respondent.*

13 Feb. 1750.

FOREIGN.—TITLE TO PURSUE.—IDIOTRY.—Found that persons appointed in England by the Lord Chancellor to manage the affairs of a lunatic, are not thereby entitled to maintain action in Scotland upon the lunatic's right.

A power of attorney, granted by one who had been judicially declared a lunatic in England, was found a sufficient title to pursue in Scotland for a debt due to him there.

[*Elchies, voce Idiotry and Furiosity, No. 2; Kilk. 209; Falc.; Mor. Dict. 4595.*]

No. 86. MORRISON, a native of England and residing there, lent L.2100, on a bond in the English form, to the Earl of Sutherland. A commission of lunacy having issued against Morrison, his sister Penelope, and Baynes her husband were, upon the verdict of the jury declaring the lunacy, appointed committees for the management of his estate. In this character they raised an action in the Court of Session against Lord Sutherland, for payment of the above bond and interest thereon.

Objected, that the pursuers had produced no title to insist in the action; that the verdict was not competent evidence in Scotland, neither could the commission granted by the Lord Chancellor affect debts or subjects in Scotland, in which country the King was not by law the guardian of lunatics, and where inquisition of lunacy, and the suc-

cession to the estates of lunatics were regulated by different rules from those which prevailed in England. That consequently the pursuers could not grant a proper discharge for the debt.

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BAYNES, &c.
v.
EARL OF SUTHERLAND.

Answered, that *mobilia sequuntur personam*, and the administration of his personal estate, granted by the proper authority in England where he had been domiciled, must be in all places of equal force as a voluntary assignment by himself; that assignments made under commissions of bankruptcy in England had been held a sufficient title to pursue for and recover money due to the bankrupts in Scotland, and the pursuers, having been duly appointed committees of Morrison's whole estate, were as much entitled to recover all such estates, as the assignees under a bankruptcy would be.

The Lord Ordinary (Elchies,) having reported the case to the Court, the pursuers,* upon a petition to the Lord Chancellor, obtained leave to procure a letter of attorney from Morrison himself, authorising them to carry on the action; by which letter they maintained, without abandoning their former argument, that all doubts of their title were now removed.

It was answered, that Morrison being notoriously a lunatic, as the proceedings respecting him in England (which were set forth in the present summons) amply proved,† the power of attorney was a mere nullity, and being executed by the authority and order of the Lord Chancellor, could not possibly have more weight than the commission pre-

* Having been advised by counsel in England, that an idiot's tutor appointed in Scotland could not, on that title, maintain action in England.—(Elchies.)

† The letter of attorney proceeded on a narrative of his lunacy, and of the access to him given by order of the Chancellor.—(Kilk.)

1730.
 HAYNES, &c.
 v.
 EARL OF SUTHERLAND.

viously granted; and that if such a proceeding were countenanced, the same method might be practised to draw the estates of all lunatics out of Scotland, not only into England, but into any other country where the lunatic might be confined, subject to order.

The Court (21 June, 1749) found, that “there was no sufficient title produced to support this action, and therefore sustained the defence,” &c.

Entered 27
 Nov. 1749.

The appeal was brought from this interlocutor.

Pleaded for the Appellants :—1. Morrison, a domiciled Englishman, having, by the laws of England, been duly declared a lunatic, and the commitment of his whole estates been granted under the Great Seal of Great Britain, the Appellants have thereby power to recover all debts due to him, in whatever place, and more particularly in a country governed by the same royal authority, and included under the same name of Great Britain. Therefore, although Scotland still retains her former laws, the title of the appellants must be held sufficient in this action for the recovery of personal property which was lent in England, and ought to have been paid there, but which now can only be sued for in the courts, and according to the laws and forms of that country where the debtor resides.

2. On the supposition that the title of the commissioners to pursue is defective, the objection thence arising to the present action is obviated by the power of attorney executed by Morrison; for if the commission and grant under the Great Seal be of no force or evidence in Scotland, the validity of the power of attorney cannot, with any consistency, be denied. Morrison confessedly has not

been found to be a lunatic by any judicial proceeding in Scotland, and therefore he must be considered as still fully capable of granting such a mandate for carrying on an action in Scotland, and for giving sufficient discharges for debts due to him there.

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BAYNES, &c.
v.
EARL OF SUTHERLAND.

The power of attorney does not derive its authority from the order of the Lord Chancellor, but as the persons and estates of lunatics in England are by law placed in the custody, and under the protection of the Crown or the Court of Chancery, no letters of attorney or other deed can be taken from the lunatic, except by order of that Court. Such order, however, extends no further than to permit the deed in question to be taken and executed by the lunatic; and therefore in Scotland the letter must have its full effect from the act of Morrison himself as his valid deed, whether the order of the Lord Chancellor be of any force or not.

Pleaded for the Respondent:—1. The commission granted by the competent authority in England can have no greater force in Scotland than a parallel proceeding in the latter country would have in England. The bond-debt in question is the lunatic's estate in Scotland; and he having heirs in different degrees in both parts of the kingdoms, where the rules of succession *ab intestato* differ materially; it is a matter of importance to his heirs that the law and jurisdiction by which his property is to be governed, be not changed. It is said that a person's being found a lunatic in the place of his residence must ascertain his condition of mind all over the world; but even supposing Morrison as much a lunatic in Scotland as if found so by an inquest there, yet the management, both of person and estate, depending entirely on different rules,

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the guardians appointed in one part of the kingdom cannot prejudice those who have a right to the office in the other part.

2. There is no inconsistency in assuming the fact of Morrison's lunacy, as proved by the proceedings in England, and yet denying the right of the English commissioners to sue for money in Scotland. The letter of attorney, therefore, being the act of a lunatic, can have no legal validity, and indeed being granted to the same commissioners, in consequence of the Lord Chancellor's order, is only a different form of attaining the same end for which their previous title was insufficient.

The objection arises upon the showing of the appellants, who ground their action upon the fact of his lunacy, and then produce a letter of attorney, said to have been executed by him. Their own assertion shows that their action cannot be maintained.

The proper way of recovering the debt is very obvious. The lunacy may be found in Scotland, without the person of the lunatic being removed there, and a committee appointed who have a right to sue for and manage his estate in Scotland, under the control of the Court there. At present, the appellants cannot give the respondent a proper discharge for the money, and he might therefore be obliged to pay the money a second time, either by Morrison, were he to recover, or, in the event of his death, by those entitled to the right of succession.

Judgment,
 13 Feb. 1750.

After hearing counsel, "It is ordered and adjudged, &c. that the said interlocutor, whereby "the Lords of Council and Session found, 'that "there was no sufficient title produced to carry on

“ ‘ the action,’ commenced by the appellants, and
 “ therefore, ‘ sustained the defence, and decerned
 “ ‘ accordingly,’ be, and the same is hereby reversed.
 “ And it is declared, that there is a sufficient title
 “ in the appellant, George Morrison, to carry on
 “ this action ; and, therefore, it is hereby ordered,
 “ that the said action be sustained at the instance
 “ of the said George Morrison.”

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For the Appellants, *W. Hamilton, K. Evans.*
 For the Respondent, *C. Maitland, W. Murray.*

Lord Elchies says, that “ the Chancellor thought the objections to
 “ the first suit well founded, and that a committee in England could
 “ not sue in Scotland, but that yet the lunatic might sue in his own
 “ name ; and that though the first suit was brought in name of his
 “ committee as of a lunatic, which they could not do in Scotland,
 “ yet when the suit was afterwards brought in the lunatic’s own name,
 “ we could take no notice of his lunacy unless a brieve of furiosity
 “ had issued, and, (I supposed, he added), that he had been found
 “ furious ; or if we did take notice of it, it could only be as a lunatic
 “ at large, which could not bar a suit in his name ; and that the
 “ union made no difference, for that the law would be the same in
 “ England.”

JAMES DAVIDSON, - - - *Appellant ;*
 CAPTAIN HENRY SINCLAIR, *et alii*, *Respondents.*

14 February 1750.

TAILZIE.—A prohibition, with irritant and resolute clauses,
 against altering the order of succession, or contracting debts, or
 doing any deed by which the right of succession may be
 prejudged in any manner of way, is ineffectual to prevent a
 sale of the estate.

[Elchies, voce Tailzie, No. 86. Mor. Dict. 15382.]

THE entail of the estate of Carlourie contained No. 87.
 prohibitory, irritant, and resolute clauses, not

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“ to alter, innovate, or infringe the foresaid tailzie
 “ or order of succession therein appointed, nor yet
 “ to contract or take on any debts or sums of mo-
 “ ney, or grant any right of wadset, rights of an-
 “ nualrent, heritable or moveable bonds, or other
 “ rights or security whatsoever therefor, &c. nor
 “ do any other fact or deed that may anywise af-
 “ fect, burden, or evict the lands, and others above
 “ resigned.”

Sinclair, the heir in possession, sold the lands with absolute warrandice to Davidson, who, alleging that the heir was disabled from selling by the above prohibition, presented a bill of suspension of a threatened charge for the price. Sinclair, thereupon, brought an action of declarator against the heirs of entail, to have it found and declared, that he had a right to sell and dispose of the estate. A counter declarator was raised by the heirs of entail, to have it found, that by the sale in question, an irritancy had been incurred under the entail.

These actions being conjoined by the Lord Ordinary, (to whom the suspension was likewise remitted,) it was pleaded for the heirs of entail, that in all settlements, the will of the donor is the governing rule, and as it was the evident intention of the maker of the entail that the succession should go invariably to the heirs, and in the order, appointed by him, and as he had prohibited all acts and deeds which might interrupt or alter that course of succession, it must import a prohibition against sales, which would completely defeat it; that the intention of the entailer was expressed in precise words, for he prohibits the heirs of entail “ to alter, innovate, or infringe “ the said tailzie or order of succession,” or to do “ any other act or deed that may any ways affect,

“burden, or evict the lands,” or “whereby the
“right or benefit of succession may be prejudged
“in any way;” which words did fully comprehend a prohibition to alien the estate in prejudice of the heirs of entail.

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The case being reported to the Court, it was found, (9th Nov. 1749,) “That Captain Henry Sinclair, the pursuer and charger, is not restrained from selling by the entail in question, there being no clauses therein *de non alienando*, and therefore, find that he may sell, and decern in terms of the declarator at his instance,” &c.

The appeal was brought from this interlocutor. Entered,
Pleaded for the Appellant:—It is inconsistent Nov. 29, 1749.

to suppose a settlement, in the form of an entail, importing a line of succession, with prohibitory clauses against contracting of debt, or altering the order of succession, and yet that any heir of entail is at the same time at liberty to sell the lands at pleasure. Besides, the prohibitory clauses are conceived in such general and comprehensive terms, as not only may, but in proper construction do include every act or deed by which the right of succession might be prejudged, which would be effectually done, contrary to the plain intention of the entailer, if a sale of the estate be allowed; so that, if these prohibitions, expressed in these general words, are to have any operation, and not to be deemed superfluous, they must surely import a prohibition to sell, and cannot be otherwise explained by any just construction.

Pleaded for the Respondents:—Although the act 1685 authorises entails with such restrictive clauses as the entailer shall think fit, yet such restraints and perpetuity of liferents, being contrary

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to the rules of common law, and to the natural use of property, are never extended farther than they are fully and clearly expressed; and, therefore, if an entail contains a prohibition to alter the order of succession, under an irritancy, this will strike against all new settlements, but it will not bar a sale of the estate, nor the charging it with debts, even although such sale or incumbrance will as effectually exclude the order of succession fixed by the entail, as any new destination whatever; for the law does not allow restraints to be imposed by implication, nor those expressed in the entail to be extended further than the words strictly bear. So likewise, although it contain further a clause prohibiting the contraction of debt, whereby the estate may be evicted, this will not import a restraint upon selling, although a sale effectually alters the course of succession, and is of greater prejudice to the heirs of entail than charging the estate with debt.

By parity of reason, although an entail contains prohibitions; against selling, against contracting debt, and altering the order of succession under an irritancy, yet if these be not also fortified with proper resolute clauses, they will be ineffectual against all such deeds. Hence, although the entail in question contains prohibitions to alter the order of succession, to contract debts, or grant securities therefor, it contains no prohibition to sell; and therefore, the heir in possession is entitled to that legal consequence of his property, in the same manner as if it had been vested in him by an unlimited title. Whatever may have been the entailor's intention, if he has not imposed this restraint by express words, his will can have no effect. In

the present case the entailer has not used proper words to prohibit a sale or alienation, but on the contrary, has omitted such prohibition; and as he has not used the known technical words for such a prohibition, but has it omitted altogether, it must be held that such was his intention, and that by the entail, as well as by the disposition of law, the heirs should be at liberty to sell the estate.

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After hearing counsel: "It is ordered and adjudged, &c. that the interlocutor complained of be, and the same is hereby affirmed."

Judgment,
Feb. 14, 1750.

For Appellant, *C. York.*

For Respondents, *W. Murray.*

The Honourable FRANCIS CHARTERIS } *Appellant*;
of Amisfield, - - - - -
The LORD ADVOCATE, - - - - - *Respondent.*

22 February 1750.

IRRITANCY.—FORFEITURE.—A conveyed his estate to the second son of B, and appointed trustees, (three of whom were declared to be a quorum,) to direct his education. He at the same time left a sum of money to B's eldest son, on condition that B did not interfere with or hinder his trustees in the management of the second son. In a claim for repetition of the money on the ground of B's interference, it was found that the forfeiture was not incurred, a quorum of the trustees never having acted.

[*Elchies v. Tutor*, No. 22. Br. Sup. v. 772. Mor. 7283.]

COLONEL CHAPTERIS of Amisfield settled his estates, No. 88. under the form of an entail, upon his grandson, (the

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appellant, the second son of the Earl of Wemyss, with the burden of L.10,000 Sterling, to be paid upon his death to Lord Elcho, Lord Wemyss's eldest son; which sum was to be laid out in purchasing preferable debts due by the family of Wemyss, the rights thereto being taken in the name of Lord Elcho. He also named tutors and curators to the appellant and his other heirs of entail, during their respective minorities. Of these he more particularly appointed four, (three being a quorum,) to have exclusively the full and only power to direct and order the education, residence, and travelling of his said heirs. "And I hereby expressly will and appoint, that neither James, Earl of Wemyss, their father, nor any of their tutors, or any other persons whatsoever, except always the persons above named for that purpose, shall have any power or voice in the education, residence, or travelling of my said heirs, as aforesaid; and in case the said Earl of Wemyss do interfere and endeavour to hinder the same; then, and in that case, I hereby declare, that the said Lord Elcho, and all other the representatives of the family of Wemyss, shall have no right or title unto, nor any claim or demand for the sum of L.10,000 which, in this deed, I dispoise to the said Lord Elcho," &c. and which disposition I, in the said event, revoke, recall, and annul, and hereby declare, that the said sum shall remain with, appertain, and belong to my own heirs of tailzie aforesaid."

Colonel Charteris died, leaving the appellant in minority; and the money being paid by his tutors and curators, (part of it upon a decret of the Court of Session,) and applied in discharging debts due by the family, the earl granted, in corroborated

tion, an heritable bond for L.10,000, upon which Lord Elcho was infest.

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None of the tutors and curators named by Colonel Charteris accepted the office, except the Earl of Islay, by whom, with the authority of the Court of Chancery in England, certain measures were taken for the care and education of the appellant, in terms of the settlement.

Lord Elcho, engaging in the rebellion, was attainted of high treason; and the appellant having, within four years after his majority, revoked the above payment and raised a reduction thereof, he entered a claim in the Court of Exchequer, as a creditor upon the confiscated estate, for the sum of L.10,000, with interest, on the ground of a breach of the above condition in the deed of settlement having been committed; inasmuch as the Earl of Wemyss had, contrary to the prohibition, directly and indirectly interposed in the ordering of his education, residence, and travelling.

Answered:—Upon the relevancy of the claim,
 1. That although the interference of the Earl, by virtue of his parental authority, with directions for the management of the claimant given by the curators, might have afforded a good defence against payment of the L.10,000; yet after it had been paid, and an heritable security granted for it to Lord Elcho, such interference could not authorize an action of repetition, because the settlement provides, in such case, only against payment of the money, (by saying, that it shall ‘remain’ with the heir) but not for the return of it, when once paid. In point of fact, the curators never acted, or gave any directions about the claimant’s education.
 2. That whatever remedy the claimant might have.

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against his guardians who paid the money, or against the Earl of Wemyss who received it, the action was not competent, in the first instance, against Lord Elcho. 3. That, supposing action could have lain at the claimant's instance against Lord Elcho, yet, not having been raised or a declarator of irritancy obtained before the forfeiture, it could not now be brought against the crown.

A condescendence was ordered, and thereafter, (22d December 1748) before answer, a conjunct proof was allowed relative to the alleged interference of the Earl; which having been reported, the Court, (5th July 1749) "having again advised" the claim, with the answers and objections there-
 "to, and having also considered the proof adduced
 "by the claimant in support of his claim, and de-
 "bate, they dismiss the said claim, and decern
 "accordingly."

Entered,
 Dec. 13, 1749.

The appeal was brought from the interlocutors of the 22d December 1748, and the 5th, 14th, and 18th July 1749.

*Pleaded for the Appellant:—*The condition is not only lawful, but founded on the most laudable motives; and being annexed to a pure gift, ought to be most liberally construed so as to effect the granter's purpose, and prevent the contemplated mischief. From the whole deed it was evidently his purpose, in charging his estate in favour of Lord Elcho, to purchase from Lord Wemyss the right of guardianship, which he could not otherwise be deprived of.

If the condition be lawful, the only question is, whether it has been broken by the Earl, either by an avowed exertion of his parental authority, or in any other manner; and that it has been, is fully es-

established by the proof. It was the plain intention of the granter to prevent any interposition at all; he has used the most distinct words to show that intention, and an actual hindrance and interposition has taken place.

The payment of the money cannot alter the nature of the case, the condition being clearly resolute or subsequent; for the payment is directed to be made immediately after the granter's death; the money is to be invested in a permanent fund, over which the condition might always operate; the condition respects not only this minority, but the minority of the other heirs; and the words used in various parts of the deed show, that when the assignment was made to Lord Elcho, the trust followed it from the original settlement, and the money was as much subject to the conditions in his hands, as it would have been in case the debts had been assigned to trustees for that purpose.

If the appellant has a right to this money, as against Lord Elcho, the attainder and vesting of his estate in the crown cannot put the appellant in a worse condition than before; nor can the crown have a better right than Lord Elcho had; the plain intent of the act being to preserve all right and claims upon confiscated estates competent before the attainder to third parties.

As to the objection, that the condition is annexed to the acceptance of the trust by at least three of the trustees named in the deed, it is answered, that the condition is in itself substantive and independent of the appointment of trustees, and absolutely prohibits any interposition by Lord Wemyss. But even supposing it to be annexed to the performance of the trust, yet it is plain that, notwith-

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standing the appointment of a quorum of three, any one trustee had a right to act, so as to give effect to the condition in terms whereof no one was to act except the persons named; and therefore, while any one named would act, the prohibition was absolute. Moreover, the appointment of a tutor by Lord Islay, with authority of the Court of Chancery, was an execution of the trust, fully answering the intention of the Colonel, and preventing any devolution of the power upon the Earl of Wemyss; and consequently made his interference an express breach of the condition.

Pleaded for the Respondent:—By the clause in question, the forfeiture of the L.10,000 is put singly upon the Earl of Wemyss' interposing his authority to take the appellant's education out of the hands of the nominees, and control their directions.

In fact, the Earl never did break the condition.

As the case happened, it was absolutely impossible that he could break the condition,—the power being given to any *three* of the nominees; and that quorum never having acted, or given any directions at all, the Earl could not interpose to prevent or hinder them; and the clause of forfeiture is plainly applicable only to the case of a quorum taking upon them to manage the appellant's education.

By payment of the money and acquiescing under that payment till Lord Elcho's attainder, all concerned have given the strongest proof that they were satisfied the condition had not been broken.

Judgment,
 Feb. 22, 1750.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the interlocutors complained of be affirmed."

For Appellant, *Cha. Maitland, Paul Jodrell.*

For Respondent, *D. Ryder, W. Murray.*

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JULIA HOG, and Others, - - - *Appellants.*
JOHN HOG, of Cammo, and MAR- }
GARET, his Daughter, - - - } *Respondents.*

27 March 1750.

BENEFICIUM COMPETENTIÆ.—Circumstances under which *beneficium competentiæ* refused to a grandfather in a question with his grandchildren, claiming under their father's marriage contract. (Judgment in absence.)

[Elchies, *h. l.* No. 3.—Mor. 4862 and 1390.]

JOHN HOG, senior, in the marriage contract of his son John, settled a jointure of L.150 upon the wife, and conveyed his lands of Ladykirk and Cammo, with other heritable and personal property, (specified in a rental and valuation under his own hand) under the burden of his own debts, in favour of his said son and the heirs-male of the marriage; reserving to himself a certain liferent annuity, and under the burden of L.1000 to his younger children, in terms of a bond of provision granted of the same date. By the contract, John, (the son) obliged himself and his heirs, in the event of there being no son of the marriage, and of there being three or more daughters, to pay to them the sum L.2500, to be divided as he should think fit.

The marriage was dissolved by the death of the husband, leaving issue four daughters, the appellants; but before this time, it had been ascertained, that the representation made by Mr. Hog, se-

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nior, of the amount of his estate had been extremely erroneous, the funds being considerably less, and the debts greater than he had stated them to be. Mr. Hog, younger, had, in consequence, been obliged to sell the bulk of the estate, so that at his death the only funds remaining were, *first*, some small heritable subjects, the rents of which were insufficient to pay the widow's annuity of L.150; Mr. Hog, senior, was infest in these subjects in an annuity of L.90, instead of his reserved liferent in the lands which were sold; but it was admitted that the widow's jointure was preferable to this. *Secondly*, the sum of L.1000, being the balance still due by the purchaser of Cammo, and which was burdened with the provision made to the younger children of Mr. Hog, senior.

In these circumstances the tutors of the appellants, being advised that their claim under their mother's marriage contract for the provision of L.2500 was preferable to the interests of Mr. Hog, senior, and of his children under the voluntary settlement made by him in their favour, adjudged the remainder of their father's property; and thereafter brought an action of reduction and declarator against Mr. Hog, senior, and his younger children, for declaring them preferable to the reserved annuity and bond of provision, and for setting the same aside, in so far as their interests were affected by them. In support of this action, it was urged, that as Mr. Hog's estate had turned out totally unequal to meet what he represented and undertook it to be sufficient for, the loss arising from such deficiency ought not to fall upon the innocent parties with or for whom he contracted, but ought to be deducted from the stipulations which he made in

his own favour; viz. his own annuity, and the revocable bond to his younger children.

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Upon the report of the Lord Drummore, Ordinary, the Court (1 Dec. 1748,) “ found the provisions in the contract of marriage in favour of the daughters of this marriage, are preferable to the reserved liferent of the defender, and to the provisions to his younger children; reserving to the defender to be heard how far he is entitled to plead the *beneficium competentiae*, and remitted to the Lord Ordinary to hear parties thereon.”

A reclaiming petition being presented for the defender, and for Margaret, (the only survivor of the three children in whose favour he had granted the bond of L.1000, and to whom he had provided in lieu thereof the interest of 3000 merks Scots,) the Court (12 July 1749) “ adhered to their former interlocutor, reserving to the said Margaret Hogg to be heard upon her claim for the interest of the 3000 merks after her father’s death,” &c.

The parties having been heard upon these points, the Court, on the report of the Lord Ordinary, (25 July 1749,) found “ the defender entitled in this case to the *beneficium competentiae*, to the extent of a necessary aliment, which they modify to the sum of L.30 Sterling for himself, and during his life; and L.100 Scots money for his daughter Margaret, payable to the defender during his and her joint lives, and to herself after his decease during her life; and find the same is to take place from Martinmas 1744, and remit to the Lord Ordinary to hear parties as to the manner of making the said aliments effectual.” And they adhered, (1 Dec.)

Thereafter the Lord Ordinary, (16 Dec. 1749,)

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found “ the said John Hog preferable to the pursuers, in virtue of his liferent infeftment on the aforesaid houses in Edinburgh, to the extent of the said sum of L.30 Sterling of aliment yearly, commencing from Martinmas 1744 during his lifetime ; and finds the said Margaret Hog also preferable to the pursuers to the extent of the said L.100 Scots, in virtue of the bond of provision from her father in favour of her and his other younger children, upon the principal sum of L.1000 Sterling and annualrents thereof, in Watson of Saughton’s bond, also commencing from Martinmas 1744 during her life, and decerns, &c.”

Entered,
10 Dec. 1749,
and 6 March
1750.

The appeal was brought from part of the interlocutors of 1 December 1748 ; part of that of 12 July 1749, and from those of 25 July, 1 and 16 December 1749.

Pleaded for the Appellants :—They are onerous creditors under their mother’s marriage contract for the provision of L.2500 ; and as such clearly preferable to any interest reserved to Mr. Hog, senior, and to the gratuitous and revocable bond in favour of his daughter.

There are not in this case *termini habiles* for the *beneficium competentiae*. The appellants are not making any claim against either of the defenders, or against any estate belonging to them. As creditors upon their father’s estate, they have attached the small residue of it, and upon that title dispute their preference with the defenders claiming against it.

The *beneficium competentiae* is founded upon the supposed natural obligation of that party against whom it is pleaded to aliment the other party who claims it ; so that wherever there lies any relevant

defence against the claim of aliment, the same must *a fortiori* exclude the *beneficium competentiæ*. In the *first* place, the appellants cannot be obliged by any law in the world to aliment the defenders, because they have not a sufficiency wherewith to aliment themselves. In the *second* place, they are not primarily liable to aliment either of them. Mr. Hog has two sons in opulent circumstances, who, as in duty bound, do regularly furnish such supplies as are necessary for his own and his daughter Margaret's support; and while they live and discharge this obligation, the respondents can have no claim of aliment against the appellants. At all events, such a claim never can be competent to Margaret, who does not stand in such a degree of relationship as to afford any ground for it.

"No counsel appearing for the respondents, and the appellants' counsel having fully stated the case and facts, and having prayed a reversal ;"

"It is ordered and adjudged, &c. that that part of the interlocutor of the 1 December 1748, reserving to the defender to be heard how far he is entitled to plead the *beneficium competentiæ*, be, and the same is hereby reversed ; and that that part of the said interlocutor of the 12 of July last, reserving to the petitioner, Margaret Hog, to be heard upon her claim for the interest of the 3000 merks after her father's death be also reversed ; and it is further ordered and adjudged, that the said interlocutor of the 25 July, and 1 December 1749, be, and are hereby likewise reversed ; and it is also ordered and adjudged, that so much of the said interlocutor of the 16 of the same December, whereby the Lord Ordinary found the said John Hog preferable to the pursuers, in vir-

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Judgment,
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“ tue of his liferent infestment on the aforesaid
 “ houses in Edinburgh, to the extent of the sum of
 “ L.30 Sterling of aliment yearly, commencing
 “ from Martinmas 1744, during his lifetime ; and
 “ found the said Margaret Hog also preferable to
 “ the said pursuers to the extent of the said L.100
 “ Scots, in virtue of the bond of provision from her
 “ father, in favour of her and his other younger
 “ children, upon the principal sum of L.1000 Ster-
 “ ling, and annualrents thereof, in Watson of Saugh-
 “ ton’s bond, also commencing from Martinmas
 “ 1744 during her lifetime, and decerned in the
 “ said preference, and assoilzied the defendants
 “ from the reductions, in so far as concerned the
 “ aforesaid liferents, be, and the same is hereby
 “ also reversed ; but without prejudice to any re-
 “ medy the said respondent, Margaret Hog, may
 “ be entitled to, in respect of any claim she may
 “ have to the annualrent or interest of 3000 merks,
 “ under the marriage-agreement, and bond of pro-
 “ vision in the appeal mentioned, after the death
 “ of the said John Hog, her father.”

For Appellants, *Alex. Lockhart.*

This case is founded on by Bankton, (l. 9. § 8.) without notice of the reversal.

PRESBYTERY of DUNSE,	-	-	<i>Appellants.</i>	1760.
JOHN HAY of Belton, Esq.	-	-	<i>Respondent.</i>	<u>PRESBYTERY</u> OF DUNSE v. HAY.

28 March 1750.

PATRONAGE.—PROCESS.—A presbytery having moderated a call to present to a vacant charge *tanquam jure devoluto*; the patron raised a declarator to have it found that he was the undoubted patron, and that he had presented *debito tempore* a qualified person. The Court of Session sustained the action as competent, and decerned in the declarator. *Reversed*, on the ground that the Lord Advocate ought to have been made a party,—reserving all objections to the jurisdiction of the Court of Session in the cause.

[Falc. Mor. 9911. Sup. V. 768.]

THE parish of Dunse being vacant, a presentation No. 90. in favour of Mr. Adam Dickson was granted by Mr. Hay of Belton, as patron. An objection to the validity of the presentation was raised in the presbytery, on the grounds, *first*, in respect that the right of patronage of the parish was not truly and *bona fide* vested in Belton; on the contrary, that Hay of Drummelzier was in reality the patron, but being unwilling to qualify himself for the valid exercise of the right, by taking the prescribed oaths to government, he had executed a simulate and trust conveyance to Belton, for the sole purpose of evading the law: and, *secondly*, in respect that the presentee had not qualified by taking the necessary oaths, until after he had obtained his licence to preach, contrary to the express provi-

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sions of the statute (5 Geo. I.) Upon these grounds the presbytery refused to admit Mr. Dickson to the church, and appointed a moderation and a call for supplying the vacancy, *jure devoluto*. Belton appealed to the synod, whence the matter was carried by a reference before the General Assembly, who, after hearing the cause at the bar, 16 May 1748, appointed the presbytery to moderate a call to Mr. Dickson.

In the mean time, and while the matter was still before the church courts, Belton brought an action of declarator in the Court of Session against the members of the presbytery, (appellants,) calling for production of his, the pursuer's titles, and of the presentation which were in their custody; and concluding to have it found, that he was undoubted patron of the parish, and had a good right to present a qualified person; that Mr. Dickson was duly and timeously presented by him, was qualified, and did accept the presentation, &c.

In defence it was pleaded, (besides the above objections to the qualifications of the respondent and his presentee,) that the proper parties to a declarator of patronage were not called, particularly Drummelzier and the other heritors of the parish; that the effect of the process was to bring under review of a civil court the proceedings of a court ecclesiastical, in matters belonging exclusively to its cognizance, which in various points of view was irregular and incompetent. The Lord Ordinary having advised with the Court, (15 February 1749,) "repelled
 "the objections made both to the pursuer's right,
 "and to the person by him presented, on account
 "of his not having taken the oaths before his first
 "licence in respect of the answers; and found

"that the pursuer had *in possessorio* sufficient
 "right to present, and that the right has not fallen
 "to the presbytery *tanquam jure devoluto*." The
 Court adhered, (25 February 1749.)

1780.
 PRESBYTERY
 OF DUNDEE
 V.
 HAY.

The appeal was brought from the interlocutors
 of the 28 and 31 January, and 15 and 25 February
 1749.

Entered,
 20 Dec. 1749.

Pleaded for the Appellants:—1. The examination and admission of ministers to benefices in Scotland, is vested in the church courts alone; and no courts of civil jurisdiction can interfere to control their determinations. Although a declarator of the right of patronage, as an action for a civil right, is competent before the Court of Session; yet the present action cannot be considered as such, because the manifest intent of it is to review the proceedings of the presbytery, to declare the presentee duly qualified, and to compel the church judicatory to admit him. The presbytery are alone made parties, whereas in a declarator of the civil right of patronage, the crown and the heritors are the proper parties, and not the church judicatory, which is to determine on the propriety of the exercise of the right, in whomsoever it is vested.

2. Neither Drummelzier, who was truly the patron, nor the presentee, were duly qualified.

Pleaded for the Respondent:—It is competent to bring a declarator of right against any party who contests, or threatens to contest the same. In the present case the respondent's object was to prevent the appellants, or even the superior ecclesiastical judicatories, from taking upon themselves, on a mistaken understanding of the point of right; to confer the benefice on any other person than his presentee.

1760.

PRESBYTERY
OF DUNSE
v.
HAY.

Judgment,
 28 March
 1760.

The interlocutors complained of in no way deny that the examination and admission of ministers belong to the church courts. They have only declared that the civil or patrimonial right of presenting belongs to the respondent and not to the appellants; after which it may still be true that the examination and admission of his presentee will be in the judgment of the ecclesiastical judicatories in their proper order.

“ The appellants’ counsel being directed to apply themselves particularly with respect to proper parties in this cause; the counsel on both sides were heard thereupon. And due consideration being had of what was offered on either side in this cause ;

“ It is declared, &c. that his majesty’s advocate for Scotland ought to have been made a party to the action of declarator brought in this cause ; and therefore ordered and adjudged, that the several interlocutors complained of in the said petition of appeal be reversed : And it is hereby further ordered, that the respondent do make his majesty’s advocate a party defender in this process ; and also be at liberty to bring such other parties before the Court as he shall be advised ; but this order to be without prejudice to any exception or objection which may properly be taken or made to the jurisdiction of the Court of Session, touching any of the matters in question in this cause.”

For Appellants, *W. Murray, A. Hume Campbell.*

For Respondent, *And. Pringle, C. Yorke.*

This reversal is not noticed in the reports of the case.

ANTHONY SAWYER, - - - *Appellant*;
Earl of MARCH and RUGLEN, - *Respondent.*

1750.
SAWYER
v.
EARL OF
MARCH.

2 April 1750.

PROOF.—WITNESS.—An instrumentary witness admitted *cum nota* to prove the delivery of the deed, although he was agent in the cause for the party proposing to adduce him.

APPEAL.—A judgment of the Court of Session refusing to examine the appellant's agent in the cause, being reversed; and it being stated by the respondent, that by another interlocutor, (not appealed from), a similar objection to the admissibility of his agent had been sustained; the House of Lords authorised him to present a petition against that interlocutor, although the reclaiming days had then expired.

[Falc. Kilk. Elchies, voce Witness, No. 29. Mor. 16757.]

THE Countess of Ruglen, by deed of assignation, No. 91. in January 1747, conveyed an heritable bond to her husband, (the appellant.) Upon her death, a competition regarding it arose between him and her son, the Earl of March and Ruglen, in which the question came to be, whether or not the deed of assignation in the appellant's favour had been delivered.

In order to prove the delivery, the appellant adduced John Ritchie, W. S. one of the instrumentary witnesses to the deed. It was objected to his competency as a witness, that he was the appellant's agent in the cause, had given partial counsel, and had been present at consultations upon the very point at issue;—that although he was a necessary

1750.

SAWYER
v.
EARL OF
MARCH.

witness to prove the execution, yet the delivery was no part of the execution, but could easily be established by other unobjectionable witnesses, if the deed had really been in the appellant's possession.

It was answered, that whatever effect this objection might have upon the credibility of the witness, it could not affect his competency; that the execution and delivery of the deed having taken place at the same time, there were, and could have been, no other witnesses present but the instrumentary witnesses, and if the appellant's agent be admitted to be a competent witness to prove the granter's subscription, he must be equally so for proving the delivery, which was in effect a part of the execution of the deed.

The Court, upon the report of the Lord Ordinary, (Nov. 21, 1749,) "sustained the objection against John Dickie, and found that he could not be received as a witness in this cause," &c.

Entered
Feb. 1, 1750.

The appeal was brought from part of the interlocutor of 21st November 1749.

Pleaded for the Appellant:—The objection to Mr. Dickie, of his being agent in the cause, cannot affect his competency; how far it may affect his credibility will be a matter for the consideration of the Court. The deed was subscribed and delivered at one and the same time. Mr. Dickie was a witness, and a very proper one, to this transaction, being the granter's ordinary agent, and the writer of the deed. He is admitted to be a good witness for proving the subscription, and why he should not be equally good for proving the delivery made at the very time of subscribing, it is impossible to find out. Of both these acts he was equally wit-

ness, and no sound reason can be assigned for disqualifying him to testify the one, when he is a necessary evidence for proving the other.

Pleaded for the Respondent:—1. By the established rules of law, no witness can be examined in a cause, who is employed in the suit by the party who produces him. Every witness examined in a civil cause, must clear himself by oath of partial counsel, and it is here admitted by the appellant that Dickie is his agent in this very cause.

2. Ronald Crawford, clerk to the signet, was produced as a witness for the respondent. The appellant objected to his competency, on the ground that he was agent for the respondent in the cause; and the fact being admitted, Mr. Crawford was rejected by an interlocutor of the 13th December 1749, finding that he could not be received as a witness for the respondent; and, therefore, the rule of law and justice *quod quisque juris in alterum statuerit, ut ipse eodem jure utatur*, ought to take place.

After hearing counsel, “it is ordered and adjudged, &c. that so much of the interlocutor of 21st November 1749, whereby the objection against John Dickie is sustained, and it is found that he could not be received as a witness in this cause, and also so much of the subsequent interlocutor as adheres thereto, be reversed; and that the said John Dickie be received and examined as a witness in this cause, *cum nota*: And it is further ordered, that the respondent be at liberty to apply by petition to the Court of Session, against an interlocutor pronounced on the 13th December last, whereby the said Court sustained an objection against the competency of Ronald Crawford, who was produced as a wit-

1750.

SAWYERS
v.
EARL OF
MARCH.

Judgment,
2 April 1750.

1750.

SAWYERS
v.
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MARCH.

“ness for the respondent, in this cause, notwithstanding the strict time limited for reclaiming “against the interlocutor, is expired.”

For Appellant, *Alex. Lockhart, A Forrester.*

For Respondent, *W. Murray, A. Hume Campbell.*

THE LORD ADVOCATE, - - - *Appellant;*
ALEXANDER, LORD FORBES OF PIT- } *Respondent.*
SLIGO, - - - - -

1 February 1751.

FALSA DEMONSTRATIO.—FORFEITURE.—Alexander, Lord Forbes of Pitaligo, found by the Court of Session to be not attainted by the attainder of “Alexander, Lord Pitaligo.” Judgment Reversed.

[Elchies, voce Forfeiture, No. 9 and 10.]

No. 92. ALEXANDER FORBES of Pitsligo, was by letters under the Great Seal, in 1663, created a baron of Scotland, by the title of Lord Forbes of Pitsligo. In 1690, the peerage devolved upon his great-grandson, the respondent. The estate, in the meantime, had been carried off by debts, but was repurchased by the respondent, who obtained from the crown a new charter in his own favour, by the name of Lord Forbes of Pitsligo, upon which he was infeft.

By an act of the 19th of Geo. II. entitled “an act “to attain Alexander Earl of Kellie, Alexander “Lord Pitsligo, and others, of high treason,” it was

enacted, that the said Earl of Kellie, "Alexander
" Lord Pitsligo," &c. should stand and be attainted
of high treason, unless they should render them-
selves up before the 12th January 1746, &c. and
by another act, 20 Geo. II. it was enacted, "that
" all estates of such persons as had been attainted
" of high treason, between June 1745 and June
" 1748, &c. should be forfeited to his majesty."

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SLIGO.

The respondent not having complied with the
above conditions, was held as attainted of high
treason, and his estate of Pitsligo was in conse-
quence surveyed, and seized by order of the Court
of Exchequer.

Thereafter the respondent, on the ground that
the act did not apply to him, presented a claim to
the Court of Session, setting forth, that none of the
persons attainted for high treason, since June 1745
and before June 1748, were interested in the
estates which had been so seized; and that he was
alone entitled thereto.

The claim was founded upon the letters patent
and the title of the peerage. It was maintained
that the proper name of the respondent was Alex-
ander Lord Forbes of Pitsligo. Whereas in the
act attainting the parties above mentioned, the
party there designed was Alexander Lord Pitsligo.

In the answers, the patent of creation (as stated
in the claim) was admitted, but it was insisted
that the respondent was the person meant, and suf-
ficiently described by the act in question; not-
withstanding every word of the description in the
patent had not been transcribed into it, and that
Pitsligo was his true and proper title, by which he
and all his ancestors had been named and describ-
ed ever since the creation of the title. In support

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of this, a variety of instances were referred to in acts of Parliament, rolls and minutes of Parliament, private deeds and instruments, sists, proceedings, and judgments in courts of justice, &c. in all which the family had been known and distinguished by the title of Pitsligo.

The Court found, (10 November 1749) that by 'the act of the 19th Geo. II. &c. the said Alexander Lord Forbes of Pitsligo is not attainted, and therefore sustained his claim.'

Entered 28
Nov. 1749.

The appeal was brought from this interlocuter.

Pleaded for the Appellant:—Pitsligo is the strict and proper title created by this patent: it is the name of a place erected long before into a barony, from whence the title was taken, and has always been so understood by the legislature, by the respondent himself, his ancestors, and all that have had any transactions with them. The respondent has constantly been known by the title of Pitsligo, and with a certainty that leaves no possibility of doubt that he was meant by that description.

The objections that have been made, all arise from the supposed legal effects of misnomers, either in conveyances, judicial proceedings, or acts of Parliament; in all of which it is said such misnomers have been fatal.

In the *first* place, there has here been no misnomer, whether it be considered according to the terms of the patent, or the titles by which the respondent has commonly been known.

But, in the *second* place, to consider each objection separately: as to conveyances, the general tenor of the cases prove the contrary, and show that it is immaterial by what name either the

granter or grantees are described, provided they are clearly and distinctly pointed out.

As to proceedings in courts of law, it is well known that a defendant in a suit at law may be called by that name which usage has given, though not the name of baptism or of his parents; and this rule extends even to criminal prosecutions. But whatever may be the ordinary rules in judicial proceedings, the construction of an act of attainder depends on no forms. The sole question is, what is the meaning of the legislature? If the meaning is plain, the judges are bound to declare that meaning to be the law; whenever a case within it comes regularly before them, whether that meaning be expressed in technical terms or not, and therefore it is, that the most penal laws have been construed even beyond the words to give effect to the obvious intention.

The cases of attainder referred to are essentially different from the present, as containing descriptions, not only contrary to and inconsistent with the real names, but unsupported by any colour of usage.

Pleaded for the Respondent:—In all judicial proceedings, the true name of the party must be set forth, and the omission of it cannot be supplied by any evidence to prove the identity of the person.

The true names of peers created by patent, are such only as the crown confers by the patent, and the omission of any constituent part of such name is as fatal as the omission of the whole, the remainder not being the true name. The title conferred by patent, is Lord Forbes of Pitsligo. The act attaints Alexander Lord Pitsligo; titles materially different. The records differing so essentially, no

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collateral evidence can be called in to prove that the person ennobled, and the person named in the act of attainder are one and the same. The family was neither ennobled by the name of Pitsligo, nor by the name of Forbes. Their peerage does not rest alone or principally upon either of the names, but upon both together, as appears by the letters patent, which are conclusive upon this point.

Although the intention of the legislature is the proper rule to discover what is the subject matter to which an act of Parliament relates, yet, whenever that appears, the ordinary rules of law must take place, and govern the particular application of the acts. This, therefore, being an act to attain certain persons by name, must be governed by the rules of law observed in similar judicial proceedings; and, accordingly, it was determined by the House of Lords, upon the opinion of all the judges, that an act attainting Major-General Thomas Gordon, laird of Auchintool, did not attain Major-General Alexander Gordon, laird of Auchintool, although no doubt could be entertained of the person intended by the legislature.*

Judgment,
Feb. 1, 1761.

After hearing counsel, the judges of England were ordered to give their opinion upon the following matter, viz. "The great grandfather of the respondent being by letters patent, under the Great Seal of Scotland, in 1663, created a peer of Scotland, by the title of Lord Forbes of Pitsligo; and the respondent, and his ancestors, claiming under the said letters patent, having commonly used and subscribed themselves to deeds and other instruments, by sometimes the name or style of Forbes of Pitsligo, and sometimes Pitsligo;

* 25 Feb. 1720.—Robertson's Appeals, No. 60.

“ and having been commonly described in legal
 “ proceedings, and otherwise, as well by the name
 “ or style of Lord Pitsligo, as of Lord Forbes of
 “ Pitsligo, and the said respondent, and his ances-
 “ tors, having been always entered in the rolls of
 “ Parliament of Scotland, before the union, and
 “ called and described in acts of the Parliament of
 “ Scotland, (except in one private act of ratifica-
 “ cation in 1681,) by the name or style of Lord
 “ Pitsligo; and it not being proved or alleged in
 “ this cause, that any other person besides the re-
 “ spondent, was at or before the passing of the act of
 “ Parliament aftermentioned, called or known by the
 “ title of Lord Pitsligo; and the respondent not hav-
 “ ing surrendered himself to justice, on or before
 “ the day specified in the act of the 19th of his ma-
 “ jesty’s reign, for attainting Alexander Earl of
 “ Kellie, and others therein named, of high trea-
 “ son; whether the respondent is by virtue of the
 “ said act attainted of high treason, by the name or
 “ title of Alexander, Lord Pitsligo? Whereupon,
 “ the Lord Chief Justice of the Court of King’s
 “ Bench having conferred with the other judges
 “ present, acquainted the House that they were
 “ unanimously of opinion, that the respondent is
 “ fully and effectually attainted by virtue of the
 “ act, by the title of Alexander, Lord Pitsligo.”

“ It is ordered and adjudged, &c. that the inter-
 “ locutor complained of be, and is hereby reversed,
 “ and it is further ordered, that the claim given
 “ before the Court of Session, on behalf of the re-
 “ spondent be, and the same is hereby dismissed.

For Appellant, *D. Ryder, W. Murray.*

For Respondent, *A. Hume Campbell, Al. For-
 rester,*

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 CATE
 v.
 LORD PIT-
 SLIGO.

1751.

BOOKSELLERS OF LONDON AND EDINBURGH.	DANIEL MIDWINTER, <i>et alii</i> Book- sellers in London,	}	<i>Appellants ;</i>
	ALEX. KINCAID, <i>et alii</i> Booksellers in Edinburgh and Glasgow,	}	<i>Respondents.</i>

11 February 1751.

PROCESS.—LITERARY PROPERTY.—ACT 8 ANNE c. 19.—Found in the House of Lords, that an action on the statute was improperly and inconsistently brought, by demanding at the same time damages for books surreptitiously sold, and also the penalties of the act ; and likewise, by joining in the same summons several pursuers claiming distinct and independent rights in different books.

[*Elchies voce Literary Property, No. 3. Mor. 8295.*]

No. 93. By the act 8 of Queen Anne, entitled “ An act for
 “ the encouragement of learning, by vesting the
 “ copies of printed books in the authors or pur-
 “ chasers of such copies during the times therein
 “ mentioned,” (as extended by act 12 Geo. II.)
 it is, *inter alia*, provided, that “ the author of any
 “ book, and his assigns, shall have the whole liber-
 “ ty of printing it for fourteen years ; and if any
 “ person, within that time, shall print, reprint, or
 “ import such book, without consent of the pro-
 “ prietor ; or knowing the same to be so printed
 “ or imported, shall publish, or expose it to sale
 “ without such consent, the offender shall forfeit
 “ the books and sheets to the proprietor, who shall
 “ damask and make them waste paper ; and fur-
 “ ther, shall forfeit one penny for every sheet found
 “ in his custody, printed or printing, one moiety to
 “ the crown, the other to him who shall sue for the

" same. It is further declared, that these for-
 " feitures shall only apply to books duly entered at
 " Stationers Hall before publication ; and that all
 " actions under this act must be brought within
 " three months after the offence done."

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Upon the ground that the provisions of this act had been violated by the respondents, an action was raised against them by the appellants, in which, after founding upon the statutes, the summons set forth : " And moreover, that abstracting from
 " the penalties of the said statutes, all persons con-
 " travening the prohibitions thereof, and thereby
 " encroaching on the property of their fellow-sub-
 " jects, to the great discouragement of learning,
 " and prejudice of the interest of the public, be-
 " come liable to an ordinary action in law or equity,
 " that they may be compelled to render damages
 " to the party aggrieved, in respect of such books
 " as they should have sold, contrary to the prohi-
 " bitions of the law, and to render up such books
 " and copies as they might still have upon hand,
 " and are not legally entitled to expose the same
 " to sale, as having been printed, reprinted, or im-
 " ported contrary to the law and to the private in-
 " terest of the lawful proprietors of the copies of
 " such books :"—and concluded, that therefore
 the said penalties ought to be adjudged against the
 defenders, " at least and in the option of the pur-
 " suers, that the defenders ought to be ordained
 " to pay damages to the pursuers for every surrep-
 " titious copy that had been sold by them or any
 " of them," and to deliver up all copies remaining
 in their possession.

Objections being made to the relevancy of this libel, the pursuers' counsel stated that " at present

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" he did not insist for the penalties in the acts of
" Parliament, but only upon the common law ;
" and that at present he restricted their said libel
" to the property of the two books, &c. and for
" the profits which the defendants had made by
" sale of those books, and the damages sustained
" by the pursuer."*

The Court (24 Dec. 1746) found, " that an ac-
" tion of damages lies at the pursuers' instance to
" the extent of the profits made by the defenders
" on such of the books libelled as have been enter-
" ed in Stationers' Hall, and reprinted in Britain,"
and appointed parties to be further heard on the
question, " Within what length of time the penal-
" ties enacted in the 12 Geo. II. can be sued
" for ?"

Parties being heard accordingly, the Court, upon
advising a petition for the defenders with answers,
found, (2 Dec. 1747) " that no action lies on the
" statute for offences against the same, except when
" it is brought within three months of the offence,
" and that no action of damages lies on the sta-
" tute."

Entered,
1 Dec. 1749.

The appeal was brought from an interlocutor of
4 February, part of the interlocutor of 24 Dec.
1746, and those of 2 Dec. 1747, and 7 June 1748.

Pleaded for the Appellants :—Where an act of
Parliament forbids an injurious act, whether under
an express penalty or not, the party aggrieved has
consequently a remedy by action, although no such
action be named or allowed by the act.

* Printed case for respondents. In all the reports of the case it is
stated that the libel was absolutely restricted; but ~~with~~ judgment of
House of Lords. It likewise appears from the proceedings in the
Court of Session, that the question of penalties was not entirely
waved.

The act in question admits a property in copies of books to have existed to the authors or their assigns before its date; and was meant as an additional security to that property for a certain term of years. The legal consequences of property at the common law is, that the proprietor may maintain an action for the violation of it. Even supposing the property in question to have been created by that statute, yet the common law and equity would operate for its security in the same manner as if it had been a property at common law.

Pleaded for the Respondents.—This action, which is admitted to be the first of its kind in Scotland, appears from the libel to be complicated and inconsistent. One branch is for the recovery of different penalties given by different statutes, one half to the crown, the other to the informer; and yet the King's Advocate is not a party, nor do the pursuers sue as well for the crown as for themselves. The second branch is an action upon the statute for damages, which is not authorised by the statutes; while if it is taken as an action for damages at common law, then it cannot be joined with an action for the penalties.

The action is brought by a number of persons alleging separate rights to several books, on which their libel is founded against the respondents, (who are twenty-four separate traders,) without charging them to be joint offenders.

It is a mistake in fact to say that this is an action in nature of a bill in equity for an account of profits, waving the penalties. The libel is expressly for penalties and damages; and the attempt to vary the nature of the cause was illegal and appears not to have been really intended: for as the

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Judgment,
 11 Feb. 1751.

appellants first restricted their libel to two books, and waved penalties, and in the next place restricted it to three books, and insisted on the penalties under the act 12 Geo. II. so in the very last step of the cause they resumed, and insisted to proceed for the penalties under the statute of Queen Anne.

After hearing counsel : " It is declared, &c. " that the action brought by the appellants in the " Court of Session was improperly and inconsist- " ently brought, by demanding at the same time " a discovery and accompt of the profits of the " books in question, and also the penalties of the " act of Parliament, which the appellants have " never absolutely waved in the proceedings be- " low ; and also by joining several pursuers claim- " ing distinct and independent rights in different " books in the same action ; and that therefore " the points determined by the said interlocutors " could not regularly come in question in this " cause : And therefore ordered and adjudged " that the said several interlocutors be reversed, " without prejudice to the determination of any of " the said points when the same shall properly be " brought in judgment : and it is hereby also de- " clared, that the libel in this case is non-relevant : " and ordered that the said Court of Session do " proceed accordingly."

For Appellants, *W. Murray, Alex. Lockhart.*

For Respondents, *A. Hume Campbell, C. Yorke.*

Lord Elchies says, that " it was written from London that it was the opinion of the House, (or seemed to be,) that a suit, if properly brought, lies for profits within the term granted by the statute, but " not after that term."

WILLIAM SUTHERLAND, of Little Torbol, Esq. - - -	} <i>Appellant.</i>	1751. <hr/> SUTHERLAND v. GORDON.
ALEXANDER GORDON of Ardoch, Esq. <i>et alii</i> - - -		
	} <i>Respondents.</i>	

7 March 1751.

PROVISION TO HEIRS AND CHILDREN.—FIAR ABSOLUTE AND LIMITED.—A disposition in a marriage contract to the heir of the marriage in fee, with an obligation to infest, and absolute warrandice, imports only a right of succession, and not a *jus crediti*, in a question with onerous creditors.

INHIBITION.—A right of succession under a marriage contract cannot by inhibition be made effectual against onerous creditors of the father.

[Falc. and Kilk. Mor. 4398. Kames, 12915.]

GORDON of Ardoch having adjudged upon an No. 94. heritable bond over the lands of Little Torbol, brought an action of ranking and sale of the same. In this action Mr. Sutherland of Little Torbol, (eldest son and heir of the debtor in the bond,) appeared and produced the contract of marriage between his father and mother, whereby the father bound "himself, his heirs and successors, to infest "his promised spouse in liferent, and the heir-male "to be procreate betwixt them in fee," in the lands of Little Torbol; and further bound himself to warrant the said infestment to his wife, and the heir-male of the marriage, for their respective interests of liferent and fee, "from all and sundry "prior infestments, inhibitions, adjudications, &c."

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And lastly, it was declared, that execution for implemment should pass on the contract at the instance of Mr. Ross, the wife's father, against Sutherland and his heirs. He also produced an inhibition which, during his infancy, had been raised on the contract of marriage by the said Mr. Ross; and he pleaded that by virtue of it, the right of fee had been so effectually secured to him as heir of the marriage, as not to be frustrated by any voluntary security for debt subsequently granted by his father; and that the debts now founded on being all posterior in date to the inhibition, the lands of Little Torbol ought to be struck out of the sale.

Answered—That the defender was not properly a creditor under the marriage contract in competition with ordinary creditors, nor could he claim the estate under that character but only as heir to his father. By the marriage contract, the hope of succession was the only thing secured to him; the fee and absolute property of the estate remained with the father, and was therefore subject to his onerous debts; and although the inhibition secured the defender's right against gratuitous deeds, it could not alter or enlarge the original obligation.

The case being reported, the Court (4 June 1747) "found that the inhibition served upon the "contract of marriage secured the defender against "the onerous contractions of the father, after the "date of the inhibition.

A petition was presented against this interlocutor, in the answers to which, it was *inter alia* pleaded, that at all events the defender was an onerous creditor of his father for the provisions in favour of the heir under the contract, and that this had been already fixed by the Court in an action

against Ross of Aldie, who being pursued by the defender's father for part of his wife's portion, stated in defence, that he was not obliged to pay until the father implemented his part by vesting the fee in the heir of the marriage; whereupon (5 Feb. 1724) it was found 'that he ought to resign the lands in favour of himself, and failing him in favour of his son *nominatim* in fee, with absolute warrandice, &c. conform to the contract, before payment of the tocher.'

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The following interlocutor was pronounced, (4th Nov. 1747:) "Having advised this petition, with the answers made thereto, with the interlocutor of date the 5 Feb. 1724, in the process at the instance of Sutherland of Little Torbol against Ross of Aldie; find that the fee by the contract of marriage, remained with the father, and only the *spes successionis* was vested in the son; and found that the inhibition did not strike against the father's onerous creditors."

Upon again considering the case on a petition, founding strongly on the clause of warrandice and a petition and answers thereto, the Court (7 Dec. 1747) altered; and found, "that the inhibition served upon the contract of marriage, which contained a clause of absolute warrandice, secured the defender against the onerous contractions of his father, posterior to the date thereof."

This interlocutor was again altered on the 3d June 1748, when it was found, "that the inhibition served on the contract of marriage, did not preclude the onerous creditors of the father, though posterior to the inhibition; and found, therefore, that the lands ought not to be struck out of the sale."

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The appeal was brought from the interlocutors of the 4th Nov. 1747, and of the 3d June 1748.

Pleaded for the Appellant:—From the whole tenor of the marriage contract—from the obligation to infest—from the clause of warrandice, and from the clause for execution at the instance of a trustee, it clearly was the intention of the parties that the fee of the estate should be absolutely secured to the heir-male of the marriage. Indeed, if no more than a *spes successionis* had been provided to the heir, the clause for execution would have been absurd, as the obligation in the contract itself sufficiently secured to him the right of succession, and barred all voluntary and gratuitous acts in prejudice of it.

The appellant is an onerous creditor of his father for the several provisions made in the contract in favour of the heir-male of the marriage. This is the legal effect of the deed, and has been established by the judgment of the Court of Session, in the previous case above mentioned. The inhibition, therefore, which was used against the appellant's father upon this obligation, not only disabled him from entering into engagements inconsistent therewith, but also put all other persons so contracting with him in *mala fide*. It is the effect of an inhibition to make a personal obligation as binding negatively upon all the lieges as it is positively upon the obligant; in other words, to prevent third parties from doing any thing that may disappoint the performance of the obligation. Now, here the fee was provided to the heir-male of the marriage, and warranted absolutely against all incumbrances. The inhibition passed upon both these obligations of provision and warrandice, and

consequently barred all transactions inconsistent with their complete execution. Of this nature entirely is the respondent's bond, which, if allowed to stand, must disappoint altogether these provisions in the appellant's favour.

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Pleaded for the Respondent.—Where an estate is settled upon the parents in conjunct fee and life-rent, and on the heirs of the marriage in fee, the power to contract debt, and to dispose of the whole for valuable considerations, continues in the party from whom the settlement proceeds. The present case falls within this rule; the fee remained with the father; and the heirs of the marriage not being *in esse* at the date of the settlement, they had only *spes successionis* subject to the father's legal power over it.

The heir of a marriage is considered in a two-fold light, as heir and as creditor; as heir, in respect of deeds granted for valuable consideration, and he is liable to the burden of such; but as creditor, in regard to voluntary and gratuitous deeds, which have no effect against him. Now a clause of warrandice cannot vary the nature of the right warranted. It may be effectual to defeat gratuitous deeds, or perhaps found an action of damages against the father's separate estate; but it cannot affect the father's right of property, or prevent others from contracting with him.

In like manner, the inhibition can have no other effect than to secure those who are interested under the contract in the enjoyment of their proper rights, according to the true construction of the deed; but it cannot have the effect of extending or enlarging these rights, so as to encroach upon or interfere with the father's right of property.

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But the obligation of warrandice expressly referred only to *prior* existing incumbrances, and therefore could not secure the right of the heir against debts afterwards entered into by the father in the exercise of that right, which in point of law remained, and would have remained in him, although he had infest the appellant in terms of the contract, as pointed out by the interlocutor of February 1724.

Judgment,
 7 March 1751.

After hearing counsel: "It is ordered and adjudged, &c. that the several interlocutors complained of be, and the same are hereby, affirmed."

For Appellant, *W. Murray, Alex. Lockhart*.
 For Respondents, *A. Hume Campbell, C. Yorke*.

The LORD ADVOCATE,	-	-	<i>Appellant;</i>
LORD BOYD, <i>et alii</i> ,	-	-	<i>Respondents.</i>

28 March 1751.

FORFEITURE.—ACT 1, GEO. I. c. 20.—A conveyance by a father to his son after the date specified in the act, sustained—the debts charged on the estate, and for which the son became personally liable, being nearly equal to the value of the lands.

[*Elchies voce* Forfeiture, No. 8.—*Falc.*—Mor. 14768.]

No. 95. WILLIAM, Earl of Kilmarnock, in 1732 disposed his estate, reserving his own liferent, to his eldest

son, Lord Boyd. The conveyance was likewise burdened with a faculty to provide L.2000 to younger children, with a jointure to Lady Kilmarnock, and with all the debts contracted by the earl or his predecessors previous to the date of the disposition. Lord Boyd was infest, and the instrument of sasine duly recorded.

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The earl was attainted of high treason during the rebellion 1745, and executed. Lord Boyd then entered into possession of the estate, and in order to pay off the debts he conveyed it to certain trustees, (respondents) by whom it was shortly afterwards sold to the Earl of Glencairn, and the purchase money applied towards satisfaction of the debts. But the estates having been surveyed by the Court of Exchequer, as forfeited by the earl's conviction, Lord Boyd and his trustees entered their claim in the Court of Session, in the manner directed by the 20 of Geo. II.

To this claim it was objected,—that by the clan act, (1 Geo. I.) it had been enacted, “ That all “ tailzies, settlements, &c. of any estates made in “ Scotland in name of whatsoever person since the “ 1 August 1714, or that should be made in time coming, by any person who shall be convicted of high “ treason, shall be void and null, excepting such “ deeds, securities, &c, as had been or should be “ made for just and onerous causes,—the said “ causes being instructed otherwise than by the “ writings themselves.” That the disposition under which the respondent claimed was posterior to the 1st of August 1714, and consequently was null and void unless the respondents could instruct the onerous cause thereof.

Answered—1st, That the above statute, and

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particularly the clause founded on, was a temporary law limited by the words, as well as by the obvious intention of the act, to the rebellion in 1715 ; and that it would be attended with very dangerous consequences to extend it in the manner proposed, as no person could be sure that the party with whom he contracted might not be guilty of high treason at the distance of thirty or forty years ; and it would be impracticable, at such a distance, to prove the onerosity of the deeds, otherwise than by the writings themselves. That this construction was strongly confirmed by the vesting act of the 20 Geo. II. whereby the very same provision was re-enacted with a retrospect only to the 24 June 1742, which is inconsistent with the idea, that the former act was to regulate convictions for high treason in 1745.*

But, supposing that the said former act could now be considered as a subsisting law, the present case comes within the exception of the statute ; for the deed 1732 was not only granted for just and rational considerations, but, in the eye of law, for causes strictly onerous, being burdened with debts to such an extent as amounted to an onerous purchase.

The Court ordained the claimant to give in a particular condescendence of the onerous causes alleged, and the manner of proof. From the condescendence it appeared, that at the date of the

* " We were all of us greatly diffculted in this question, except the President, who said he thought the act lasted only during the rebellion 1715, to which opinion he was chiefly determined by the clause ; but as the lawyers at the bar hinted that they would be able to prove the onerous cause, we all agreed, before answer, to order them to give in a condescendence of them and of the manner of proof."—(*Elchies' Notes.*)

deed the debts charged upon the estate, and for which Lord Boyd became personally liable, exceeded the value of the estate at the time.

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In the answers to the condescendence it was attempted to be shown, that in fact the estate exceeded in value the incumbrances with which it was charged;* but it was chiefly insisted in point of law, that, it not being alleged that Lord Boyd paid or gave to the late Earl any price or valuable consideration whatever out of his own money or any separate estate of his, it could not be maintained that the conveyance had been made 'for just and onerous causes,' in the true sense of the act, nothing being *given* for that conveyance by the disponent. So far as the debts are real and *bona fide*, the creditors will not be prejudiced; but Lord Boyd now claims the reversion of the estate for no consideration. That is the only thing now in question, and it is the settlement of that only which is alleged to be voided by the clause founded on.

Replied—That the plain intention of the statute, (supposing it to be now binding,) was to prevent fraudulent conveyances, calculated to avoid the effect of forfeiture for high treason, supposed to have been in view when such conveyances were executed; so that, where the grant appeared so far just and onerous as to exclude all suspicion of such a design, the conveyance must be held to fall within the exception. Here there can be no suspicion of evil intentions in granting the disposition, as it was not until long after its date that the earl was seduced from his loyalty. By virtue of the

* Monboddie mentions that the debts extended to twenty-two years purchase of the estate, and that it was sold at twenty-seven years purchase.—(*Brown's Sup. V. 774.*)

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disposition, the respondent became personally liable for the debts charged on the estate, which at least equalled its value at that time; and in fact he had granted his personal security to several of the creditors. The transaction, therefore, was the same as if he had engaged to pay, as the purchase money of the estate, a sum of money equivalent to these debts. Supposing the value of the estate to have since increased, this cannot affect the question, which must be governed by the state of matters at the date of the conveyance in 1732.

Entered
 28 Nov. 1749.
 Judgment,
 28 March
 1751.

The Court sustained the claim, and decerned, (27 July 1749.)

The appeal was brought from this interlocutor.

After hearing counsel: "It is declared, &c. that it appearing that the amount of the debts charged upon the estate in question, to which the respondent, Boyd, became personally liable, by his acceptance of the right under the deed of 10 August 1732, was, at the time of making the said deed, equal to the then value of the said estate, or thereabouts,—the said interlocutor or decree ought to be affirmed, and it is therefore ordered and adjudged, that the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor or decree be, and the same is hereby affirmed."

For Appellant, *D. Ryder, W. Grant, W. Murray.*

For Respondents, *A. Hume Campbell, Alex. Lockhart.*

"The Lord Chancellor stated three material points in the cause; 1st, Whether the clan act was or was not temporary? 2d, Whether Lord Kilmarnock was or was not attainted of

"the treason therein mentioned? 3d, Whether the disposition
 "1732 was onerous or not? He thought the discussion of the
 "first point might rather be reserved for some other cases that
 "might come before them; but I am told that by his way of
 "reasoning he seemed to think it temporary. The second he
 "thought unnecessary, because that objection had not been
 "made for the claimant before us; and as to the third, he
 "thought the disposition onerous: and if the House was of that
 "opinion, he proposed that the judgment should be, to declare
 "that the debts chargeable on the estate, and on the respondents
 "to pay, being equal or thereabouts to the value of the estate
 "at the time that the disposition was executed, the disposition
 "was therefore onerous, and the interlocutor complained of
 "should therefore be affirmed; which the House agreed to."
 —(*Elchies.*)

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THOMAS DRUMMOND of Logie Almond, } *Appellant*;
 The LORD ADVOCATE, } *Respondent.*

30 April 1751.

FORFEITURE.—ACT 19, GEO. II. c. 26.—A person being attainted by virtue of the act, which declared that if he did not surrender himself before the 12 July following, he should stand attainted of treason from the 18 April preceding;—it was found that the forfeiture did not operate *retro* to the effect of incapacitating him to succeed to property in the interval.

WRIT.—Circumstances under which a deed was not considered a delivered evident.

[*Elchies voce* Forfeiture, No. 15.—*Falc.*—*Mor.* 4875.]

By the act 19 Geo. II. it is enacted, That if No. 96. certain persons therein mentioned, and among

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others James Drummond, (commonly called Duke of Perth,) and John Drummond his brother, should not respectively surrender themselves to justice, on or before the 12 July 1746, they should stand attainted of high treason from and after the 18 April 1746.

By the vesting act of the 20th of Geo. II. all lands, &c. which any person, attainted of high treason within the time therein limited, was possessed of or interested in on the 24th June 1745 or at any time afterwards, were forfeited to the crown. In pursuance of this act, the estates of the said James Drummond being surveyed by order of the Court of Exchequer, a claim to them was given in upon the part of Mr. Drummond of Logie Almond, (the appellant) in virtue of a trust-disposition executed by James Drummond in his favour in June 1743. Objections (to be noticed immediately) were stated to this deed; but it being proved that James Drummond had died on the 11th May 1749, the Court (July 29, 1749) found, "that James Drummond (taking upon himself the title of Duke of Perth) having died upon the 11th May 1746, before 11th July 1746, on or before which day he was allowed by the said act of attainer to render himself and submit to justice, he, the said James Drummond, was not attainted by the said act; and therefore find, that this Court has no jurisdiction to proceed further in judging of the validity or effect of the disposition from the said James Drummond to Thomas Drummond, the claimant, *in hoc statu*, leaving the claimant to follow forth his right thereon as accords."*

* Elchies voce Forfeiture, No. 7. Mor. 4874.

This judgment was acquiesced in ; but a second survey was made of the estate as forfeited by the attainder of John Drummond, to whom it was alleged that it had devolved upon the death of James, his brother, without issue ; the said John Drummond being included in the act of attainder, and having failed to surrender himself before the specified day. The appellant then anew entered his claim, founding on the above disposition in 1743 by James Drummond in his favour, and maintained that in consequence thereof John Drummond was not possessed of the estate, nor in any way entitled to it on the 24th June 1745, or at any time afterwards. Although the deed had never been in the actual possession of the claimant, it had been put by the granter into the hands of Mr. Graham of Airth, advocate, for the purposes of in- feftment and registration.

Answered—1st, That the deed in question not dispensing with delivery, and never having been delivered, was void and ineffectual. Mr. Graham was the ordinary legal adviser of the granter, and therefore the deed must be held to be still in his custody while in the hands of Mr. Graham. 2dly, That even if it had dispensed with delivery, yet from its terms, from the whole circumstances of the case, and particularly the fact that the possession of the estates had been always retained by James Drummond, it was evidently the sole intention of this latent personal deed to evade the eventual forfeiture of the granter and his brother ; and therefore that it could not be effectual to frustrate the claim of the crown.

The appellant further maintained,—That John Drummond, upon his failure to surrender himself

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in terms of the act, became attainted of high treason from and after the 18th April 1746, and therefore on the 11th of May, when his brother died, he was incapable to take the estate as his heir, or consequently to forfeit the same to the king. But, that in respect of his attainder, it fell to the superior or overlord, as an escheat *propter defectum hæredis*; so that the survey of the lands, as being forfeited by John's attainder, was erroneous.

Answered—1st, That the objection was *jus tertii* to the appellant, who did not pretend to be the overlord of whom the estate was held; that in fact the king himself was in this case superior, and so having both titles, a twofold claim was competent to him; one by forfeiture, and the other by escheat; and he had the option of using either.* 2dly, That the survey of the estate as forfeited by John Drummond was proper, because on the 11 of May, when the succession opened to him, he was not attainted, (in the same way as it had been decided that his brother James was not then attainted,) and therefore there was nothing in law to have hindered him from entering into the possession of the lands, or from levying the half-year's rent payable at Whitsunday 1746, or from completing his title to the estate as heir to his brother; his conditional attainder not taking place for two months afterwards, viz. on the 12 July.

The Court (1 Dec. 1750) “ find, that John “ Drummond, (second son to the late Lord Drum-

* A claim was afterwards made, under the clan act, by the Duke of Atholl, who was superior of part of the lands. The claim was dismissed, (Nov. 26, 1760) on the ground that the rebel had not been vassal during the continuance of the treason, or prior to the attainder. —(*Fac. Col. Mor.* 4766.)

“mond,) now attainted of high treason, was upon
 “the 11 May 1746, when James Drummond, his
 “elder brother, died, capable to take by descent
 “from his said elder brother, and that the estate
 “of Drummond in question did then descend by
 “James’s death to John Drummond, now attaint-
 “ed, and was forfeitable, and forfeited by the trea-
 “son and attainder of the said John Drummond;
 “and that the trust-disposition to Thomas Drum-
 “mond of Logie Almond, now claimed upon, is
 “not sufficient to exclude the forfeiture of the said
 “John Drummond, and therefore find the estate
 “acclaimed, forfeited by his attainder; dismiss the
 “claim, and decern accordingly.”

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Entered,
 Feb. 1, 1751.

The appeal was brought from this interlocutor.

“After hearing counsel, the judges were direct-
 “ed to give their opinion on the following question,
 “*videlicet*, ‘Whether, by the law of England,
 ‘John Drummond, second son of the late Lord
 ‘Drummond, was on the 11th of May 1746, ca-
 ‘pable of taking lands by descent? and, whether,
 ‘by his not rendering himself to justice, on or be-
 ‘fore the 12th July 1746, according to the act of
 ‘the 19th year of his present majesty, such descent
 ‘became divested or avoided, so as to prevent the
 ‘forfeiture in prejudice of the crown?’ Whereup-
 “on, the Lord Chief Baron of the Court of Ex-
 “chequer, having conferred with the judges pre-
 “sent, acquainted the house, ‘that they were
 ‘unanimously of opinion, that the said John
 ‘Drummond was capable at that time of taking
 ‘lands by descent; and that, by his not rendering
 ‘himself to justice, on or before the 12th July
 ‘1746, according to the aforementioned act of the

1751. ' 19th year of his present majesty, such descent did
 DRUMMOND ' not become divested or avoided, so as to prevent
 " ' the forfeiture in prejudice of the crown.'
 LORD ADVOCATE. " And, upon due consideration had of what was
 Judgment, " offered on either side in this cause, it is ordered
 30 April 1751. " and adjudged, &c. that the said petition and ap-
 " peal be, and is hereby dismissed, and that the
 " said judgment be affirmed."

For Appellant, *A. Hume Campbell, Alex. Lockhart, C. York.*

For Respondent, *D. Ryder, Wm. Grant, Wm. Murray.*

The LORD ADVOCATE,	-	-	<i>Appellant.</i>
JOHN GORDON, Esq. <i>et è contra</i>			<i>Respondent.</i>

21 May 1751.

TAILIE.—FORFEITURE.—ACT 7 ANNÆ, c. 21.—An entail prohibiting, under strict irritant and resolute clauses, "any deed civil or criminal, or even treasonable, whereby the estate may be in any way evicted, forfeited," &c. ; and it being declared that any such deed "should only irritate the right of the committer thereof, but should in no ways affect the right of the next heir, albeit descending of the contravener's body,—Found, that by the attainder of the heir in possession, the estate was forfeited to the crown, not only during his own life, but so long as there should survive any issue of his body who would have been entitled to succeed under the entail, had there been no attainder ; and further, that whatever interest might eventually arise to the attainted person under the substitution to "the heirs and assignees" of the entailer, was also forfeited to the crown.

The heir possessing under an entail being attainted,—it was

found not competent to bring a declaration of irritancy on the ground of an act of contravention committed some time prior to the attainer.

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[Elchies, *voce* Tailzie, No. 39. Falc. Mor. 4728.]

THE estate of Park was settled by Sir James Gordon in 1713 under the fetters of a strict entail, the heirs under which were prohibited *inter alia* "to grant infeftments of annualrent out of the same, or any other right and security redeemable or irredeemable, nor to contract debt, or do any other deeds of omission or commission, civil or criminal, or even treasonable, (as God forbid) whereby the lands may be anywise burdened, adjudged, evicted, or become caducuary, escheat, confiscated, or forfeited." It is further declared, that such debts "or crimes shall only irritate and make void the contravener's right, but no ways burden, affect, or forfeit the said lands, to the prejudice of the next heir of tailzie," &c.

No. 97.

In 1746, Sir William Gordon of Park was attainted of high treason, and his estate being surveyed by the Exchequer, a claim was entered by his younger brother (the respondent) on the following grounds, viz. 1st, That Sir William having in 1738, granted an heritable bond over part of the estate whereon infeftment followed, an irritancy was thereby incurred, and consequently the estate did *ipso facto* fall and accresce to the claimant as next heir of entail. 2d, That by committing the crime of treason, Sir William did contravene the prohibitive and irritant clauses above recited, whereupon the estate devolved on the claim-

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ant; and, *lastly*, that at all events, Sir William could forfeit by his attainder only his own liferent interest in the entailed estate, which upon his death must belong to the claimant.

In *answer* to the first ground of claim, it was disputed that any part of the entailed lands was included in the bond; and at any rate the irritancy might have been purged by payment of the debt. But further, even if the claim upon this irritancy had been competent, it came too late, when brought for the first time against the crown, after the estates had been vested in it by the attainder; there having been sufficient time between the date of the bond in 1738 and the rebellion, to declare the irritancy. *Craig de Feudis*, L. 3. D. 6. sect. 17.

Replied—Ignorance or inadvertence would not save Sir William from the irritancy. The claimant was not *in mora* in not declaring the irritancy sooner, having been abroad during the whole interval. His *jus actionis* subsisted for forty years; and in the statute, whence the crown derives its right, there is an express saving of “all rights, &c. “which were binding on the forfeited persons, “and might have affected the estate before the “respective days and times whereon the same was “vested in his majesty.”

To the remaining grounds of claim, it was *answered*, 1st, that by 7 Annæ, c. 21. all persons convicted of high treason in Scotland, are made “subject and liable to the same corruption of “blood, pains, penalties, and forfeitures as persons “convicted or attainted of high treason in Eng- “land.” And by 26 Hen. VIII. c. 13. all persons so convicted, forfeit to the king “all such

"lands, tenements, and hereditaments, which they shall have, of any estate of inheritance in use or possession, by any right, title, or means, within this realm of England, or elsewhere within any of the king's dominions, at the time of such treason committed, or any time after." The estate in question was beyond doubt an estate of inheritance, belonging to Sir William, and consequently forfeited to the king by his attainder. It was a real estate vested in his person and descendable to heirs; he was the sole vassal of the crown in it, and if he had died at the faith and peace of the king, the next heir must have made up his title by service upon the brief of mort ancestry as nearest heir of tailzie to him, dying last vest and seized in the estate. The act 1685, proves that every possessor of an entailed estate is "infest in the fee thereof," and this fee, like that of other estates of inheritance, must be transmitted from the dead to the living by service.

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2. The act 7 Annæ, in regard to the forfeiture of entailed estates, excepts the issue of marriages contracted by the attainted person before a specified day; plainly establishing that in any case not falling under the exception, the descendants of the attainted person are equally affected by the forfeiture; and the children of Sir William (who must exclude the claimant's pretensions as next heir of entail) would be in this situation.

Replied—By the general spirit of the law of England, no man forfeited by his crime what he could not alienate when of full age. In this way, although estates in fee simple conditional, were forfeitable for high treason at common law, yet when by the statute of Westminster (2 and 13 Edw.

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1.) they were entailed and unalienable, they were not deemed forfeitable by the treason of the donee, except during his own life, although in the statute there is no express exemption of them from such forfeiture. It was not until the policy of law had rendered them alienable, by the method of docking the entail, that such estates were subjected to forfeiture by authority of Parliament. But there is no instance in the law of England where a person could forfeit a greater estate for his crime than he could actually convey by his deed; excepting only under the acts 26 and 38 Hen. VIII. specially designed to curb and reduce the power of the clergy, and which were afterwards modified by 5th and 6th of Edw. VI. c. 11. whereby the forfeiture of an ecclesiastic was restricted to his own life without prejudice to his successor. It is evident that estates in Scotland tailzied under the act 1685, are unalienable, and consequently under the spirit of the English law, are forfeitable only for the life of the attainted person: which is agreeable likewise to the recital of the act 1690, c. 33. The term "estate of inheritance" being unknown to the Scotch law, ought not to be strained to infer a forfeiture. Entailed estates in Scotland are no more "estates of inheritance" within the provision of the 26 Henry VIII. than estates in England limited to a man for life with remainder to his sons in succession in tail, the possession of each being equally limited and the right of the son in each case to succeed, equally indefeasible; and the Court of Chancery held them to be the same in the case of Colonel Charteris of Amisfield.*

* A general reference was also made to several cases determined after the Rebellion in 1715.

The Court, (16th Nov. 1750,) “ find, that Sir William Gordon, the person attainted, being by “ the entail disabled from alienating the estate, “ charging the same with debts, or altering the “ course of succession in prejudice of the claimant, “ and the other heirs of tailzie, or from otherwise “ hurting or impairing their right or title to the “ said estate after his death, in any manner of way “ whatsoever; that, therefore, the estate and barony of Park is, by Sir William’s attainder, forfeited to the crown only during his life; and find that the said John Gordon, the claimant, hath right to the estate after the death of the said Sir William Gordon. And also find that the irritancy alleged to have been incurred by Sir William Gordon, the attainted person, not having been declared nor any advantage taken of it before the forfeiting, that the forfeiture cannot be overreached or excluded on pretence of that irritancy; and decern and declare accordingly.”

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An appeal was brought by the Lord Advocate, from this interlocutor, so far as it finds that the estate is forfeited only during the life of Sir William Gordon. Entered, 31 Jan. 1751.

A cross appeal was brought by John Gordon, from the above interlocutor, so far as it finds that the forfeiture could not be excluded by the alleged irritancy committed in 1738. Entered 13 Feb. 75

Pleaded for the Lord Advocate.—1. The law of England concerning treason, (which is now the law of Scotland also,) makes every estate of inheritance forfeitable for high treason, without distinguishing whether it was or was not alienable by the consent or deed of the proprietor; and, as before the act of the 7 Queen Anne making the laws of treason

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the same in both countries, every estate, except entailed estates, was in Scotland already subject to forfeiture for high treason, this act, unless it did also subject tailzied estates, operated nothing new in respect to such forfeitures.

2. Supposing the irritancy had been incurred, (which has not yet been proved,) the property did not thereby *ipso facto* pass from Sir William Gordon and vest in the claimant. To operate such transmission, a decree of declarator was necessary, and no such decree having been obtained, nor even action brought before the attainder, the estate remained in Sir William, and therefore being by the attainder forfeited to the crown, it is not now subject to be carried off on pretence of an irritancy so long neglected to be enforced.

The claimant would derive no benefit from the irritancy, even if it were declared, there being issue male existing of the body of Sir William.

Pleaded for Mr. Gordon.:—The legal effect of an entail containing the necessary clauses, is to prevent every heir of entail from selling, charging, or encumbering the estate; and all deeds to the contrary are void.

Although by the act of Queen Anne forfeitures for high treason in England are extended to Scotland, yet as no estates can now be created in England, analogous to the *jus crediti* of heirs of entail under the act 1685 in Scotland, such rights must, in applying to them the law of England, be considered as a limitation of particular estates, independent of each other, and consequently forfeitable only as bare freeholds or liferents, and not affected by the acts of any of the other heirs. Entailed estates in England, when they were first

made unalienable by the statute *de donis*, were thereby held not to be forfeitable for high treason ; and they continued so until the statute of the 26th of Henry VIII. which made them forfeitable after they had become alienable.

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It is agreeable to the principles of natural justice, that no man by his crime should forfeit the right of an innocent person, and this is consonant both to the spirit of the law of England, which never allows a party to forfeit what he cannot alienate, and to the maxims of the law of Scotland declared at the revolution, and embodied in the statute book in 1690.

2. In the vesting act, (20th Geo. II.) there is an express saving of all rights which were binding on the forfeited persons, and might have affected the estate before the attainder. The right resulting from the irritancy was a right vested in the claimant at the time of the forfeiture, as the interlocutor itself admits. All then that the claimant omitted, was to follow out this right with possession, by a declarator. But as the right is preserved by the express words of the statute, so a remedy is likewise given by the statute for every right so preserved ; and, consequently, it is directly repugnant to the plain words and meaning of the statute, to say that the right is barred, or the remedy taken away by the forfeiture of Sir William Gordon.

After hearing counsel, the following question 16 May 1751 was put to the English judges for their opinion, viz. ‘ Supposing that, by the law of Scotland, an ‘ estate tailzie, with prohibitive irritant and resolute clauses, is an estate of inheritance ; and supposing also, that by the law of Scotland, no estate ‘ or interest was vested in Sir William Gordon, by

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‘ virtue of the limitations in the settlement of 19th October 1713, to the heirs-male of the body of Sir James Gordon ; what estate or interest in the barony and lands in question was forfeited to the crown, under the limitations of the said settlement, by the attainder of Sir William Gordon ?’

“ The Lord Chief Baron of the Court of Exchequer, delivered the unanimous opinion of the judges, as follows, viz.

‘ That the estate and interest in the barony and lands in question, which was forfeited to the crown, under the limitations of the said settlement, by the attainder of Sir William Gordon, was not only during the life of Sir William Gordon, but so long as there shall be any issue male of his body which would be inheritable to the estate tailzie in case he had not been attainted ; and that the reversionary interest in the fee thereof, limited by the settlement to the heirs and assigns whatsoever of Sir James Gordon, on failure of the heirs-male of the body of Sir James Gordon, and the determination of the several estates by the other substitutions therein contained, was also forfeited ; supposing that, by the laws of Scotland, such reversionary interest was in Sir William Gordon at the time of his attainder.’

Judgment.

“ It is, after debate, ordered and adjudged, &c. that the first part of the said interlocutor, whereby the Lords of Session found, ‘ that Sir William Gordon, the person attainted, being, by the entail, disabled from alienating the estate, charging the same with debts, or altering the course of succession in prejudice of the claimant and the other heirs of tailzie, or from otherwise hurting

‘ or impairing their right or title to the said estate
 ‘ after his death in any manner of way whatsoever ;
 ‘ that, therefore, the estate and barony of Park is,
 ‘ by Sir William’s attainder, forfeited to the crown
 ‘ only during his life ;’ and find, ‘ that the said
 ‘ John Gordon, the claimant, hath right to the
 ‘ said estate and barony of Park, after the death of
 ‘ the said Sir William Gordon, ‘ be, and the same
 “ is hereby *reversed*: And it is further ordered
 “ and adjudged, that the latter part of the said
 “ interlocutor, whereby the Lords of Session found,
 ‘ that the irritancy alleged to be incurred by Sir
 ‘ William Gordon, the attainted person, not having
 ‘ been declared, nor no advantage taken of it be-
 ‘ fore the forfeiture, the forfeiture cannot be over-
 ‘ reached or excluded on pretence of that irri-
 ‘ tancy,’ be, and the same is hereby *affirmed*:
 “ And it is also hereby declared and adjudged,
 “ that Sir William Gordon, the person attainted,
 “ being under the settlement made by his father
 “ Sir James Gordon, in October 1713, seized of
 “ an estate tailzie in the barony and estate of
 “ Park, notwithstanding such tailzie was affect-
 “ ed with prohibitive, irritant, and resolute clauses,
 “ the said barony and estate of Park did, by
 “ virtue of the statute of the 7th of Queen
 “ Anne, c. 21, become forfeited to the crown,
 “ by the said Sir William Gordon’s attainder,
 “ during his life, and the continuance of such
 “ issue male of his body as would have been in-
 “ heritable to the said estate tailzie in case he
 “ had not been attainted, and also for such estate
 “ and interest as was vested in, or might have been
 “ claimed by the said Sir William Gordon, by
 “ virtue of the last limitation in the said settle-

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“ment, to the heirs and assignees whatsoever of
 “the said Sir James Gordon, after all the sub-
 “stitutions therein contained shall be expired
 “or determined; and that, by virtue of the sub-
 “stitution to the heir-male of the said Sir James
 “Gordon’s body of his then present marriage,
 “the respondent, John Gordon, hath right to suc-
 “ceed to the said estate and barony of Park,
 “after the death of the said Sir William Gordon,
 “and failure of such issue male of his body as
 “aforesaid, according to the limitations in the
 “said settlement: And it is further ordered;
 “that liberty be reserved to the crown, and also
 “to the said John Gordon, and any other person
 “who may become entitled to the said barony and
 “estate of Park by virtue of any of the said sub-
 “stitutions, to apply to the Court of Session, for
 “such further order or direction in the premises
 “as shall be just, as often as any new right shall
 “accrue to them, respectively, in consequence of
 “any of the substitutions or limitations in the said
 “settlement.”

For appellant, *D. Ryder, Wm. Grant, Wm. Murray.*

For Respondent, *A. Hume Campbell, Robert Craigie, Alex. Lockhart.*

Vide case between the same parties, 4 Feb. 1754. *Infra.*

Mrs. MAGDALEN COCHRANE, <i>alias</i>	} <i>Appellant</i> ;	1753. KENNEDY V. CAMPBELLS.
KENNEDY, - - -		
Mrs. JEAN CAMPBELL, and JEAN	} <i>Respondents</i> .	
her Daughter, - - -		

31 January 1753.

HUSBAND AND WIFE.—A man having been married privately to A, and lived with her as his wife in public for twenty years, and procreated several children; B after his death alleged a previous clandestine marriage with him. Mutual declarators were raised, and strong circumstances adduced by B to establish the first marriage; yet as she had entirely concealed her pretended marriage during her husband's lifetime, and had several times been in company with him and A together, and owned her as his wife, it was found that she had not proved her prior marriage.

PERSONAL OBJECTION.—PROOF.—In the circumstances of the case, the Court of Session found that B was barred *personalit exceptione* from proving the prior marriage.—Reversed of consent.*

[*Elochie*, *Proof*, No. 7. Sup. V. 789. Falc. Mor. 10456.]

CAMPBELL of Carrick having been married clandestinely to Jean Campbell, (the respondent,) did for many years live publicly with her as his wife, and four children were born of the marriage. Being killed at the battle of Fontenoy, a competition arose for the status of his wife. The appellant, Mrs. Kennedy, being in London at the time of his death, obtained letters of administration as his wi-

* This branch of the case was the subject of a separate appeal, the report of which is embodied in the present case, and the judgment given in a note on page 523. Falconer's Report extends only to this branch.

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dow, and in that character applied at the war office for the pension. With the view of contesting this claim, the respondent brought a declarator of her marriage, libelling that she had been married to Carrick on the 9 Dec. 1725; and she called the appellant as a party. On the other hand, the appellant likewise raised a declarator of marriage, (to which she made the respondent a party,) setting forth that she had been privately married to Carrick on 3d July 1724.

In support of the former action, the respondent produced, 1. A certificate signed by Mr. George Bennet, a clergyman of the Church of England, who married her, and by two witnesses who had been present at the marriage. 2. An extract from the minutes of the kirk-session of Roseneath, instructing that on the 24 March following, Mrs. Carrick and the respondent had appeared before the kirk-session, owned their irregular marriage, produced the above certificate, and having been rebuked by the minister, had solemnly renewed their marriage vows. 3. Extract from the parish registers of the births and burials of their children. 4. Extract deed of conveyance by Carrick in favour of trustees for his creditors, to which the respondent was a consenting party. 5. Copy assignment of his pay in part for behoof of his creditors, the residue to be accounted for to himself or to the respondent his wife, for the use of his family. 6. Numerous letters from Carrick,* and various members of his family, address-

* The following letter was cited as a specimen. "My ever dearest Jeanie,—This, if it comes safe to hand, is the eleventh letter I have wrote to you, without knowing whether you are dead or alive, but by second hand. This, if I really love you, must give me the utmost pain, which, as I hope to see God in mercy, I do sincerely

ed to her as his wife. She further proved by witnesses that her marriage had never been objected to or questioned, although she and Carrick had cohabited publicly as man and wife, from the time of its celebration in 1725 until her husband's death ; during all which time she had been received and treated as his wife, not only by all their common friends, relations, and acquaintance, but even by the appellant herself.*

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" from the bottom of my soul, as much as ever husband loved a wife.
 " This I am determined to do to the last moment of my life, in spite
 " of all who think otherwise: If you have heard villainous stories of
 " me, don't give ear to them, for they must be owing to a certain
 " wretch, who deserves all the mischief in my power, and whose face
 " I'll never see: you may guess who I mean. As I am told, by Mr.
 " Archibald Campbell, that my estate is sold, and there will be some
 " reversion, I hereby give a right all the days of your life to reversion,
 " and all my household furniture and moveables; and I desire you'll
 " immediately cause Archibald Campbell draw up a right in form in
 " your favour, and send it here to me to sign, and I shall return it as
 " soon as possible. I send my blessing to my child," &c.

* Clara Macaulay deponed, " That in the year 1728, (her husband
 " being then provost of Edinburgh,) the said Captain Campbell hav-
 " ing been invited to dinner at their house, he came up in the fore-
 " noon to the deponent, and desired, as a favour of her, that she
 " would invite the respondent his wife, and the appellant Mrs. Ken-
 " nedy, to dine with her that day, because he wanted to have his
 " wife made acquainted with Mrs. Kennedy; that the deponent did
 " invite the appellant and respondent accordingly, who both came;
 " and while they were together, Captain Campbell came into the
 " room, and in the presence of Mrs. Kennedy, did treat the respon-
 " dent as his wife, and the appellant as Mrs. Kennedy; that the de-
 " ponent treated them so likewise, and that the two ladies conversed
 " with each other, and under the characters of Lady Carrick and
 " Mrs. Kennedy." Mary Campbell deponed, " That soon after the
 " respondent's and Captain Campbell's marriage broke out, they
 " came to the deponent's mother's house at Stirling, as husband and
 " wife, where they staid some days and nights; that during their
 " stay, there was one room and bed prepared for them in the said
 " house, where she believes they lay; that Mrs. Kennedy was all the
 " time of this visit in the deponent's mother's house, and had a sepa-
 " rate room and bed prepared for her; that at the time of the said

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In the appellant's action, the following interlocutor was pronounced : (23 June 1747.) "The commissaries having considered the libelled summons with the writs therewith produced, defenses for the respondents, answers, replies, and duplies, have before answer, allowed Mrs. Magdalen Cochrane (appellant) a proof of her libel, and of all facts and circumstances tending to infer the marriage libelled ; and grant diligence accordingly."

Against this interlocutor, the respondent presented a bill of advocacy, which being refused

"visit, the appellant assumed the name of Mrs. Kennedy, and was treated by Captain Campbell and the family under that character ; and that the deponent, her mother, and the whole family, behaved to the respondent as Lady Carrick." Lady Schaw deponed, "that being at Glasgow, and hearing Mrs. Kennedy was there, the deponent sent for her, and told her, that she was sorry to hear of her keeping a criminal correspondence with Carrick. To which the appellant answered, that as she should answer to God, she had no correspondence with Carrick further than a kiss of civility when he came to Edinburgh or left it ; that in her widowhood Carrick had proposed marriage to her, which she had agreed to ; but he proposed first to go home and put his house in order, after which he was to return and marry her ; and in the meantime, when he was at Roseneath, he married Mrs. Jean Campbell ; and concluded with promising the deponent, that she would never see or entertain Carrick again." As to Carrick's sentiments on the subject, it was deponed by Mr. M'Millan, (a witness afterwards adduced by the appellant in the course of the action at her instance,) "That Provost Campbell and Carrick talking together concerning Carrick's keeping company with the appellant, Carrick promised the Provost that he would see the appellant no more, and have no further correspondence with her." Mrs. Sussanna Campbell deponed, "That a little before Carrick left Scotland, when he was at Camnail, (his own house,) the deponent came into his room, where she saw several letters lying, which he threw into the fire, and the deponent being asked what he was then burning, he answered that they were that damned w—— Mrs. Kennedy's letters ; and the deponent owning that she had abstracted two of them, he begged of her not to show them to the respondent, his wife, for that she had got but too much grief by letters of that kind already."

by the Lord Ordinary, (Arniston,) she reclaimed, and founding on the above evidence of marriage, and public cohabitation as married persons for twenty years, and especially on the fact of their having repeatedly been acknowledged and addressed as such by the appellant, she maintained that under these circumstances, and after the death of the husband, the appellant could not be admitted to dispute her status as his wife; that she was barred from the proof of her libel *personali exceptione*, being by her own showing *particeps fraudis*, and concurring in the criminal silence by which the respondent had been induced to believe herself a lawful married wife.

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The Court (28 July 1747) remitted "to the commissaries with this instruction, to find that Mrs. Kennedy is barred *personali exceptione* from being admitted to prove that she was married to Mr. Campbell of Carrick before he was married to the petitioner, Mrs. Jean Campbell." The commissaries, in terms of this remit, dismissed the process at the instance of the appellant; and in the respondent's action they decerned in terms of the libel.

These interlocutors were (of consent) reversed upon appeal to the House of Lords, and the interlocutor of the commissaries allowing a proof was affirmed.*

* Appeal entered, 26 Nov. 1747. Judgment, 6th Feb. 1749. "The appellant's counsel was heard shortly to state the case, and prayed, &c. and the counsel for the respondents being likewise heard, and consenting thereto, it was ordered and adjudged, &c. (upon the consent of the said respondents) that the said interlocutor of the Lords of Session of the 28 July 1747, except such part thereof as remits the bill of advocacy and cause back to the commissaries, and the interlocutor of the Lord Ordinary in respect

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The appellant then stated, that Carrick had paid his addresses to her when they were both very young, but his estate being encumbered, he was sent to sea, and during his absence she married and became a widow : That at his return she was living in the Abbey of Paisley with her relative the Earl of Dundonald, when he renewed his addresses, and they were privately married in the Abbey, on the 3d July 1724, by Mr. William Cockburne, an episcopal clergyman, in the presence of William and Archibald M'Intyre, servants of Carrick : That Mr. Cockburne, lest he should be punished for the irregularity, refused to grant a certificate, but Carrick gave her a holograph writing (produced) in these terms : " At Paisley, the 3d of July 1724 ; this day, I John Campbell of Carrick, do hereby certify and declare that I was solemnly and lawfully married to Mrs. Magdalen Cochran, lawful daughter of Alexander Cochrane of Bonshaw, Esq. now my dear wife, as witness my hand, place and date aforesaid, John Campbell : " That Carrick's affairs being still embarrassed, he was apprehensive that his marriage to the appellant (who had a family, and only L.600 of her own) might displease his relatives, especially his uncle Ardkinglass, on whom he was extremely dependant ; and they therefore resolved to keep it

" thereof of the 29 July 1747, and also the two interlocutors or sentences of the commissaries in consequence thereof, dated the 5 and 6 August 1747, be and the same are hereby reversed ; and it is further ordered and adjudged, that the interlocutor of the commissaries of the 23 June 1747 be and the same is hereby affirmed."

Elchies remarks, that the judgment of the Court of Session was even given up by Mr. Erskine, Lady Carrick's counsel, as untenable ; (as Mr. AL. Ross her solicitor wrote.) How different are the opinions of men in this mortal state !"

secret: That they behaved and treated each other as husband and wife, in so far as was consistent with the plan of secrecy; and she having taken a house in Edinburgh, he lived with her there as often as the duties of his regiment permitted him: That notwithstanding all their caution, the secret transpired, and a rumour of the marriage was circulated in Paisley and the neighbourhood: That to allay her uneasiness at the continued concealment of the marriage, he wrote to her this letter: "My dear Maudie, I am just now in a very great hurry, and I beg you'll not be uneasy, and in a few days I design myself the pleasure of seeing you, in order to declare publicly our marriage. I hope it will be to the satisfaction of us both. Sure I am it will be to my dear Maudie's most affectionate husband and slave, John Campbell. Camsail, 4th Nov. 1725. To Mrs. Kennedy, at her house in the Canongate, Edinburgh:" That they continued to correspond as husband and wife in the most affectionate manner; in proof of which she produced 128 letters from him, addressed to her as his wife: That when he had unfortunately formed the connection with the respondent, he informed the appellant of it in a letter deeply deploring his guilt, pleading in his excuse the arts by which he had been ensnared, acknowledging the injury he had done to her, and solemnly declaring that she alone was his lawful wife:* That, in consi-

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* "My dearest dear, allow me still to call you so; the contents of this letter will certainly astonish and confound you. Unable as I am either to write or act as I ought to do with regard to any thing, I must acquaint you with the most melancholy and terrible misfortune that ever happened to man, who had nothing in view but to be happy, in doing all the duties of a regardful and most

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deration of his excuses, and being over persuaded that her claim, if then urged, might ruin him, (and consequently his family,) and even endanger his life, she consented to delay until such time as she

“ affectionate husband, to the best and most dearly beloved of women ;
 “ but alas, how have I deprived myself of that happiness ! How justly
 “ have I forfeited that honest and sincere love I might have expected
 “ from you, my wife, my friend, and only joy in life, and to which,
 “ from our mutual engagements and marriage, I had a real title. Mi-
 “ serable soul that I am ! I have lost all hopes of comfort, by the
 “ snares of a silly, worthless, and self-designing woman, whose re-
 “ peated advances I have always shunned as I would have done the
 “ devil, and to whom I never gave the least encouragement, and far
 “ less promises ; yea, never thought of her ; yet alas, how shall I be
 “ able to express it ? Notwithstanding of the undoubted just and only
 “ title you have had, and always must have to me, as your husband,
 “ and whatever else can be called mine, which you can, when you
 “ please, make appear, and at times claim me as such, I have, with-
 “ out giving myself time to think seriously, through fear of disoblig-
 “ ing the Duke of Argyle and his friends, plunged myself into the
 “ utmost misery. You’ll by this time guess what I mean. Alas,
 “ what shall I say to my dearest Maudie ? Though my hands are
 “ guilty, my heart is free. Oh ! how shall I mention that fatal
 “ night, which has been the cause of all my woe, when having drank
 “ to a very great pitch, and sitting alone in the fields, that deceitful
 “ woman, or rather devil, whom the world now calls my w—e, and
 “ who, on every occasion, laid traps to ensnare me, designedly threw
 “ herself in my way. How shall I tell you what followed ? My spi-
 “ rits fail me ; I sink, I can no more.—Ruin and destruction to me,
 “ by her ensnaring insinuations and cursed lewd behaviour, and my
 “ not being master of myself, I did—Oh, how shall I name it ?
 “ She fell with child, which was all the devil wanted, joined with her
 “ vicious inclinations, to bring about her own ends ; and in horror
 “ and confusion of mind, for the reasons above, and to prevent my
 “ flying the country, (reasons too slight, nay, not to be named when
 “ seriously thought on,) have put myself in the damnable situation I
 “ am now in. Alas, why did I yield to the fears of disobliging the
 “ Duke of Argyle, or any bad treatment I might have met with from
 “ my uncle, by declaring our marriage to the world at the time it
 “ happened ? Why did my dearest wife join with me in being silent
 “ in an affair upon which our sole happiness in life depended ? Why,
 “ nothing but her tender regard for her husband, and which, though
 “ I have no reason to expect it, must be the only cause I don’t meet
 “ with her just vengeance, which I not only deserve, but the curse of

might make it with less danger to him : That, in the meantime, in their letters, they repeatedly renewed their professions of love and honour, as married persons, and from time to time communicated their marriage to several of their friends : * That, in consequence of Carrick's apprehensions from the respondent's relations, and the increasing difficulty of his own affairs, the publication of their marriage was delayed until the time of his death.

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The commissaries (25 Jan. 1751) found, " that " Mrs. Magdalen Cochrane, (appellant) has not " proved her prior marriage libelled, and therefore " dismissed her process, and assoilzied the defenders ; and found facts, circumstances and qualifications, as proven in behalf of Mrs. Jean " Campbell, relevant to infer marriage, &c. and " decern." And a bill of advocacy was (19

" God, unless, by sincere repentance, he forgive me. Alas, what " shall I do? May I, who, from my distressed soul, on my knees beg " forgiveness, expect it from injured innocence, in imitation of his " goodness. Though you have a soul noble and generous, I on no " other account deserve it ; but alas, pity me who am ruined by the " snares of a damnable deceitful little wretch, and who has brought " me under the guilt of the most inexpressible piece of injustice to " the best and most deserving wife ; yet I must unalterably be " yours ; I was so, I am so to the last moment of my life. There- " fore, O dearest and most injured of women, let me, from a broken " heart, and sincere repentance, beg and conjure you to give peace to " my troubled soul, by allowing me to see you, that I may more fully " explain the miserable state I am in. Grant me this favour, that on " my knees, and with a heart full of sorrow and contrition, I may " ask forgiveness. O forgive, if possible, your greatly distressed and " most unhappy husband, JOHN CAMPBELL. March 1, 1726.

" To Mrs. Campbell of Carrick, at her house at Edinburgh."

• Upon this particular, the respondent alleged that where the evidence was not from the lips of infamous persons, the communications spoken of had not been made until many years after the alleged marriage, and under oaths of the most inviolable secrecy.

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June) refused by the Lord Ordinary, after advising with the Lords.

The appeal was brought from the interlocutors of the 25 Jan. and 19 June 1751.

Pleaded for the Appellant:—Marriage is a contract indissoluble by the consent of parties. If properly proved, no court of law can withhold its legal effects; and during its subsistence, neither party can contract a second marriage; any attempt to do so must be an absolute nullity. No such second marriage, in whatever manner contracted, and attended with whatever circumstances, can be a bar to establishing the fact of the prior marriage. This is the law of England as well as Scotland.

If the appellant's marriage be proved, no subsequent conduct on her part can annihilate it, or have the effect to make the respondent the lawful wife of Carrick, who was the lawful husband of the appellant. And the appellant has proved in the clearest manner her marriage.

It is said that the respondent's marriage is completely established; but by the previous marriage to the appellant, any other marriage was rendered absolutely impossible in law. The evidence may prove polygamy against Carrick, but it cannot prove that the appellant ceased to be, or that the respondent became, his lawful wife.

The respondent has brought no proof of a marriage; she does not even say where it was solemnized, for in her libel it is only said, "that she was married near by the house of her parents, in the parish of Roseneath," which is in the highlands; and yet the witnesses, who are the same as those present at the appellant's marriage, assume their lowland name of Wright, instead of their ordinary

name of M'Intyre. These individuals lived at Rose-neath, where the Highland language was spoken, and where they always went by that name; so that if they had been witnesses to the respondent's marriage, and had subscribed her pretended certificate, they must have done it in the name of Archibald and William M'Intyre, and not in their lowland name of Wright. And as to the farce of the rebuke before the kirk-session, it is hard to understand how it could constitute a marriage, or be a renewal of a marriage vow, so as to be equivalent to marriage. There can be no instance found in Scotland where a gentleman and his lady were rebuked by a kirk-session for a clandestine or irregular marriage. And the real object of this rebuke was what had passed in the fields, when the parties had sexual intercourse together. The proof the appellant has led is sufficient to constitute that marriage; and this effect ought equally to hold where a competition of one marriage with another takes place, although the result may be to disannul that marriage; because law makes no difference in a proof of marriage in a case where there is a competition and where there is none. And no exception can possibly take place on the ground of *exceptio doli*, because she was not the author of that dole, nor of that silence, on the subject of her marriage, of which the respondent is pleased to take advantage. She was forced into this against her inclinations and will. And had she heard of the proclamation of banns of the respondent's marriage with Campbell of Carrick, she would have opposed them, as an outrage done to her preferable claims.

Pleaded for the Respondent:—The respondent's marriage stands authentically proved by the certifi-

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cate of the minister who married her to Captain Campbell, the declaration of the witnesses present, the renewal of the marriage vows, and promise of adherence, before the minister and the kirk-session of Roseneath, their long and public cohabitation, and procreation of children, as husband and wife, their being acknowledged and treated as such, by all the captain's family, and people of fashion in the country where they dwelt, and by numerous letters and acknowledgments. The marriage thus constituted must prevail over one defectively constituted. In regard to the appellant's marriage, the paper of 3d July 1724, signed by Captain Campbell, is not signed by any minister or witnesses. Of the two surviving witnesses who were present on that occasion, the one knows nothing of the matter, and the other swears that he never heard of it but from the appellant. And those witnesses that are adduced to prove Campbell's acknowledgment, one is contradicted by five others in a most material part, and the other is certified to be infamous. But whatever be the force and effect of this evidence, this is clear, that whatever proof attended with consummation and cohabitation might be deemed sufficient, where both parties are free, yet where there is a competition, nothing less than the most pregnant proof is sufficient to annul a subsequent marriage duly proved, completed by cohabitation, and every other necessary act. This rule is undoubted; and it holds with double force where the appellant has not only lain by with her claim for twenty years together, but has also acknowledged the other lady to be the real wife.

After hearing counsel it was

Ordered and adjudged, that the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors and final decreet or sentence of the Commissaries therein complained of, be, and the same are hereby affirmed.

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For Appellants, *W. Murray, G. Hay.*

For the Respondent, *Al. Forrester, C. Yorke.*

Note. Professor Bell states, that the Court of Session affirmed the sentence of the Commissaries on questionable grounds; and that the judgment, when taken to the House of Lords, was affirmed only on an arrangement between the parties.—Bell's *Illust.* vol. ii. p. 248. The journals of the House of Lords do not bear any evidence of this arrangement; but state, that counsel on both sides were heard for three days, and that the judgment proceeded on due consideration had of what was said on either side. Perhaps the arrangement had reference to the previous part of the case appealed, on the point, whether there should be a proof before answer; in which the judgment of the Court of Session was reversed of *consent*: But in the appeal of the final decision of the cause, the proceedings of the House of Lords were as follow: (*Journals*, vol. xxviii. p. 9.)

19th January 1753. "A petition of Magdalen Campbell was presented to the House and read, setting forth, 'That the petitioner's agent being out of town, she did not know till last Wednesday afternoon that her appeal, in which Jean Campbell is respondent, stood appointed for this day;' and praying, 'in regard the petitioner's counsel are not prepared to attend this day, that the hearing of the said cause may be put off for a week.'

"And thereupon the agents on both sides were called on and heard at the bar. And being withdrawn:—Ordered that the hearing of the said cause be put off to this day seven-night; and the other cause removed, to come on in course." At p. 12.

26th January 1753. "After hearing counsel in part upon the amended petition and appeal of Magdalen Cochran *alias* Campbell, widow and administratrix of Captain John Campbell of Carrick deceased, and Alexander and Archibald Stevenson, conjunct procurators fiscal of Court, to which Jean Campbell and

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her daughter are respondents :—It is ordered, That the further hearing of the said cause be adjourned to Monday next ; and that the counsel be called in precisely at one o'clock ; and that the other cause be removed of course."

31st Jannary 1753. " After hearing counsel, as well on Friday and Monday last as this day, upon the amended petition and appeal of Magdalen Cochran otherwise Campbell, widow and administratrix of Captain John Campbell of Carrick deceased, and Alexander and Archibald Stevensons, conjunct procurators fiscal of Court ; complaining of an interlocutor of the Commissaries of Edinburgh of the 25th January 1751, and of an interlocutor of the Lords of Session in Scotland of the 19th June 1751, and of the final decreet or sentence of the said Commissaries, in consequence and conformable to the said interlocutor of the said 25th January 1751, made on behalf of Mrs Jean Campbell, praying, ' That the same might be reversed and set aside; and that the said Lords of Session might be directed to resume the appellant's bill of advocacy, and remit the cause to the said Commissaries ; and that such relief might be granted to the appellant as to this House, in their great justice and wisdom, should seem meet.' As also upon answer of the said Jean Campbell, relict of Captain John Campbell of Carrick, and Jean Campbell, only child now in life procreated of the marriage between the said Captain John Campbell and the said Jean Campbell his spouse, put in to the said appeal; and due consideration had of what was offered on either side in this cause : It is ordered and adjudged that the said petition and appeal be dismissed, and the interlocutors be *affirmed*."

" Ordered, That the Judges do prepare and bring in a bill, for the better preventing of clandestine marriages."

See Wilson and Shaw's Appeal Cases, vol. iii. p. 135 (note) ; this last paragraph is made erroneously to apply to the proceedings in the *first* appeal.

[Mor. 10662.]

Mrs JACOBINA CLARKE, . . .	<i>Appellant.</i>	1753.
The EARL of HOME, . . .	<i>Respondent.</i>	CLARKE
		v.
		EARL OF HOME.

House of Lords, 16th April, 1753.

PRESCRIPTION OF ADJUDICATION.—Held that adjudication with charter and infestment were not sufficient to save from the negative and positive prescription, no possession having followed of the lands adjudged, these having never been out of the proprietor's possession; and possession of a part not being sufficient to interrupt prescription as to the whole, but only the part so possessed.

WILLIAM TROTTER granted a bond to Gilbert No. 99. Clark for 4000 merks, payable to him, "his heirs, "executors, and assigns," upon which action was raised for payment, first against Helen Trotter, the executrix of the granter, and inhibition used thereon in 1652. Gilbert Clark dying, a new suit was brought by his executors in 1691 against John Fowlis, the grandson and heir of Helen Trotter, who in the mean time had died. Defences were given in to this action; but being overruled, the defender renounced, and decree assolzleing him from the passive titles was pronounced, but discerning against him "*cognitionis causa tantum*, to the effect that the said "David Clarke (appellant's father) might have process, and action of adjudication, and others competent, *contra hereditatem jacentem et bona mobilia*."

Upon this adjudication was led, by which a decree of apprising, dated Feb. 7, 1655, obtained by Helen Trotter and John Fowlis, her husband, against James, late Earl of Home, for a debt due by him to her, amounting to L.1286, 13s. 4d., was adjudged; discerning and ordaining the said decree of apprising to belong to him, the said David Clark; and the present

1644.
1650.

1753.
 CLARKE
 v.
 EARL OF HOME.

action of maills and duties was now brought against the present Earl of Home, respondent, whose lands had been adjudged by that apprising. The defence stated was, that no demand having been made on the original bond from 1644 to 1691, for more than forty years, the debt was prescribed. Reply that proceedings had followed on the debt, which was sufficient to interrupt prescription. In particular that the inhibition in 1652 had been used, and that David Clark was a minor from 1654 to 1670, and that an adjudication had followed thereon of Helen Trotter's apprising, into which the debt was now merged. Duply: Assuming this debt to be now merged in the apprising which was adjudged, this apprising was prescribed; and if the apprising was prescribed, so was the debt which it secured; and the Earl pleaded the positive prescription as to his own titles, and the negative prescription as to that part of Helen Trotter's apprising adjudged by the pursuer—no possession having followed upon it to make it effectual, as the Earl and his ancestors had never lost possession of the lands so appraised, but retained the whole all along.

Answered:—Although Helen Trotter had no possession herself under her apprising, yet she had been infeft, and had conveyed part of the apprising to Trotter of Chester Hall, and part to Gibson of Durie, whose rights had been ratified by the Earl of Home, and whose possession of the lands appraised was sufficient to interrupt prescription as to the whole, which principle must govern in order to get quit of the anomaly of a right being retained in part, and lost in part.

November 20,
 1740.

The Court “found that the said Jacobina Clarke (the pursuer) has not proved her reply of interruption, and therefore sustained the defence of prescription.”

On second petition the Court adhered; and in pursuance of a remit to the Lord Ordinary, assoilzied the defenders, and decerned.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant:—The appellant's right to the incumbrance is completely established by the adjudication of the decree of apprising, to which therefore no objection lies in so far as the title is concerned. With regard to the negative prescription, which is the main objection stated to the apprising, as the ground of the present demand, all that by law is necessary to interrupt prescription, and to elide the plea, is, that a document be taken on the right demanded, and against which prescription is pleaded. In the present case document has been taken on the debt,—an adjudication has been led of an apprising, upon which infestment and possession have followed, and although this apprising was a right in security for payment of the debt, redeemable at any time within the legal, yet after the expiry of the legal it was converted into an absolute right in Helen Trotter. Helen Trotter conveyed part to George Trotter, who, upon the title, possessed part of the lands contained in the apprising, which possession was sufficient to interrupt prescription as to the whole. Also document was taken otherwise, sufficient to interrupt prescription, for by disposition granted by Helen Trotter to John Gibson, the entire apprising is conveyed, reserving a power to dispoise to a certain extent, to the executors of Gilbert Clarke, and also by a contract executed in 1716 by the Earl's ancestors, with Gibson of Durie the faculty or power above reserved to Helen Trotter, was expressly considered as a subsisting right, and the disposition by Gibson of

1753.
CLARKE
v.
EARL OF HOME.
January 27,
1747-8.
February 11,
1747-8.

1753.

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 v.
 EARL OF HOME.

Durie to the Earl is granted, subject to and under burden of this faculty and power in favour of Helen Trotter. All which, with possession thereon, were sufficient to elide prescription.

Pleaded by the Respondent:—Helen Trotter's apprising of the defender's whole estate, upon which charter followed, was either an absolute right of property to that whole estate, or is no right at all. It could not be an absolute right, because it was a mere right in security, taken in legal course of diligence, to secure payment of the bond; but this right was redeemable at any time within the legal; and the adjudication itself is now prescribed, and good for nothing. The respondent's right in the whole estate adjudged, which has never been out of his or his ancestors' possession, is fortified by the positive prescription, in terms of the statute 1617. He produces a regular title so far back as 1638, under which he and his predecessors have continued in the uninterrupted possession of the estate, and by the statute is a title which totally bars every challenge. If therefore Helen Trotter's apprising is to be considered as only a claim of debt, every action competent, *eo nomine*, would be cut off by the negative prescription. The possession had by Mortonhall of the lands of Fogo and Sisterpath, and by Gibson of Durie of the lands of Longbirgham, is no interruption either of the negative or positive prescription. Their possession could be only attributable to the debt, and if the right itself is prescribed, the possession had upon it will be unavailing. But supposing it availing, it would not follow that this possession was good for the whole. They each purchased certain shares only of the apprising, and each possessed on his own right. They had no connection with Helen Trotter,

and therefore their possession, at the utmost, could only be good for their own part.

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v.

EARL OF HOME.

After hearing counsel, it was

Ordered and adjudged, That the interlocutors complained of by the original and amended appeal of the said Jacobina Clarke be, and the same are hereby, affirmed, except as to such part of the lands of Longbirgham as were allotted and disposed to Alexander, Earl of Home, by the contract and disposition between the said Earl Alexander and Gibson of Durie, dated the 27th day of January 1716; and that as to such part of the said lands, the said interlocutors be reversed, and the defence of prescription be repelled. And it is hereby declared, that the apprising in question is a subsisting diligence as to that part of the said lands of Longbirgham. And it is further ordered and adjudged, that the mails and duties of that part of the said lands be subject thereto, and that same be applied accordingly; and that the accompt to be taken of the annual rent or interest of the principal sum of four thousand merks, claimed by the appellant, be not carried farther back than, but restricted to commence from the term of the first citation in this cause. And as to the several interlocutors complained of in the said cross-appeal, it is hereby further ordered and adjudged, that the same, so far as they are not hereby reversed, be affirmed. And it is hereby further ordered that the said Lords of Session do give the proper directions for carrying the judgment into execution.

For the Appellant, *A. Hume Campbell, George Brown.*

For the Respondent, *W. Murray, Alex. Lockhart.*

<u>1753.</u> <u>MERCER</u> <u>v.</u> HIS MAJESTY'S ADVOCATE	CHARLES MERCER, second son of Sir Lawrence Mercer, His MAJESTY'S ADVOCATE,	}	<i>Appellant;</i> <i>Respondent.</i>
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House of Lords, 14th May, 1753.

ENTAIL.—FORFEITURE.—Held that the appellant was not entitled to claim his brother's forfeited estate, he not being an heir-substitute, but an heir male, of the marriage under the investitures. And that the deed he founded on not containing prohibitory, irritant, and resolute clauses, nor recorded, could not support his claim.

No. 100. SIR LAWRENCE MERCER of Lethindy was attainted for high treason in 1746, and the estate forfeited to the Crown.

The appellant, his brother, made his claim to the estate in terms of the vesting act, on the ground that the attainder could not affect him, or bar his rights as substitute, under the investitures of the estate.

The investitures stood thus:—Their father, Sir Lawrence, the elder, by contract of marriage entered into by him and his wife, became bound to resign his lands and his estate of Lethindy in favour of himself and the heirs male to be procreated betwixt him and his said wife, and the heirs of their bodies, &c., which failing, to his other heirs of tailzie and provision specified in a writ to be granted.

April 20,
1722.

May 24, 1722. In implement of this obligation, and of this date, he executed a deed of entail containing a destination “in favour of himself and the heirs male or female of the second marriage,” the eldest heir female always succeeding without division, whom failing, the issue male, and failing them, the issue female of Jean Mercer, his own eldest daughter of his first marriage,

with several substitutions over. And of this date he granted a procuratory for resigning the estate of Le-thindy, and the other entailed lands, for new infeftments to be granted thereof "to himself and Lawrence Mercer, his eldest son, procreated of the said marriage betwixt him and dame Christian Kinlock, and the longest liver of them two, in conjunct fee; and failing the longest liver of them by decease, to the heirs of the said Lawrence Mercer's body, whom failing, to Charles Mercer his second son, and the heirs of his body." This deed bore to be granted under the limitations of the previous entail. It did not specially enumerate the prohibitory, irritant, and resolute clauses thereof, but only bore a reference to them. Infeftment followed, and the infeftment was recorded. Of this marriage with Lady Kinloch there were three sons, Lawrence, afterwards Sir Lawrence the attainted person, Charles the claimant, and Robert.

The appellant, Charles Mercer, on his elder brother's attainder, pleaded, that, by the last mentioned deed, there was a distinct and independent substitution or limitation over, of the succession to the entailed estate, after failure of his elder brother Lawrence Mercer, and the issue male of his body, to the appellant by name; and as Lawrence died without issue, the estate tail, which was vested in him, devolved by that destination on him as substitute, and therefore the attainder of his brother could not affect the right so conferred. To this it was answered, that, by the act 1685 concerning entails, "It is declared that such tailzie shall only be allowed, in which the *irritant* and *resolute clauses* are insert in the *procuratories* of *resignation*, charters, precepts and instruments of sasine;" and the original tailzie

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 MERCER
 v.
 HIS MAJESTY'S
 ADVOCATE.
 Jan. 26, 1725.

1753.

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ADVOCATE.

itself recorded. But as the latter deed of 1725, under which the appellant claims, neither contained the irritant or resolute clauses of a strict entail, nor was recorded, both of which the said act required, the appellant could not claim.

July 1, 1752.

The Court pronounced this interlocutor:—"Find, " that the deed of entail in the year 1725, under " which the claimant, Charles Mercer, claims the " lands and barony of Lethindy, and others mention- " ed in the claim, not having been recorded in terms " of the Act of Parliament 1685, is therefore void " and null, and no claim can be sustained thereon; " and therefore dismiss the said claim, and decern."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant:—The two deeds of 1722 and 1725 make but one settlement, the latter being only explanatory of the former, and the same lines of heirs to take in both. Although, therefore, there be no prohibitive, irritant, and resolute clauses in the latter deed, yet, as it is made with reference to the former, the prohibitive, irritant, and resolute clauses must be held as incorporated therein. And if this result be conceded, it will be found that all the directions of the Act 1685 have been complied with, namely, that the entail contains the usual prohibitive and irritant and resolute clauses, and that it has been registered as the Act requires. Nor was the varying of the general limitation to Sir Lawrence Mercer, and the heirs male of the marriage in the *first* deed, to that of conjunct fee in him and his eldest son, Lawrence Mercer, with a substitution over to the appellant, in the *second* deed, such an alteration, as made a second registration necessary. This right of substitution conferred on him by his father,

could not be cut off by the attainder of his brother. That this forfeiture could only affect his brother and the heirs of his body, but not the substitutes.

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 v.
 HIS MAJESTY'S
 ADVOCATE.

Pleaded for the Respondent:—By the entail 1722, the estate claimed by the appellant is settled upon Sir Lawrence Mercer, and the heirs male procreate, or to be procreate, between him and Christian Kinloch, his wife, and the heirs of their bodies, with several substitutions over. And Lawrence Mercer, the attainted person, having taken the estate under the limitation to the heirs male of the marriage, he was seized of the estate tail; and that whole estate being by his attainder forfeited to his Majesty, the appellant, who cannot claim as a substitute, because he is not such, but only an heir male of the marriage, is excluded; and the whole estate, therefore, having been vested in Lawrence Mercer as heir male of the marriage, has now been forfeited by his attainder. Besides, the deed on which the appellant founds that he is substitute, is void and null as an entail, because it does not contain irritant and resolute clauses, nor was it produced judicially before the Lords of Session, nor recorded.

After hearing counsel, it was

Ordered and adjudged, that the said appeal be dismissed, and that the said interlocutors therein complained of be, and the same are hereby, affirmed.

For the Appellant, *Alex. Lockhart, Al. Forrester.*

For the Respondent, *Sir D. Ryder, Attorney-General, Wm. Grant, W. Murray, Solicitor-General of England.*

Note.—Vide Elchie's Notes, p. 461. The case of Gordon of Park was chiefly relied on by the appellant. Vide p. 508, Craigie and Stewart's Reports.

1753.	GRIZEL CRAIK, daughter of Adam	} <i>Appellant.</i>
CRAIK,	Craik, and grand-daughter of	
v.	William Craik, - -	
CRAIK.	JEAN CRAIK, daughter of William	} <i>Respondent.</i>
	Craik, - - - -	

House of Lords, 21st May 1753.

MARRIAGE CONTRACT—POWERS OF FATHER—FIAR—RES JUDICATA.—Held where a father had bound himself by the marriage contract to convey his estate to the heirs male of the marriage, this did not prevent him from making an entail in favour of the heir male and series of substitutes. Circumstances in which points raised were *res judicata*.

No. 101. WILLIAM CRAIK of Duchrae, on his marriage with Grizel Wallace, his first wife, entered into articles
Feb. 1710. of marriage, whereby he bound himself to secure to “himself and the heirs male of that marriage, the “said lands and barony of Duchrae.”

Of this marriage there were issue—Adam Craik the appellant's father, and Jean Craik the respondent.

After the death of his first wife, William Craik married a second and third time, but without having issue with either marriage.

In the lifetime of his third wife, he executed a deed in the nature of a tailzie, which proceeds in
1723. implement of his first marriage contract, and conveys “the lands and barony of Duchrae to the said Adam, “his son of the first marriage, and the heirs male “lawfully to be procreated of his body, whom failing, to the heirs male to be procreated of his own “body in their present marriage; which failing, to the “respondent, Jean, his only daughter of the marriage, and the heirs male of her body.” Power was

given to the said son to grant reasonable provisions; but the deed set forth "that the heirs of tailzie should " no ways have liberty, or any right, title, or privilege to disappoint his design in favour of the heirs " of tailzie, and course of succession above specified."

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v.
CRAIK.

Upon this deed the son, Adam, was infeft after his father's death. But afterwards conceiving that the above entail was in contravention of the marriage contract, which conferred on him an unlimited estate, he raised a reduction of it against his sister, Jean, who was then an infant, on the ground that it was granted in fraud of the marriage articles. No appearance was made for the respondent, she being then an infant.

Pending the suit, he got married, and having made up titles to the estate as absolute fiar, had entered into articles of marriage, settling the estate of Duchrae on the heir male of his marriage, which failing, upon the heirs male of his own body in any subsequent marriage; *which failing, upon the heirs female of his present marriage.*

The cause coming to be heard *ex parte*, and the Court considering it *pars judicis* to examine into the relevancy of the grounds of reduction, were unanimously of opinion, that William, the father, notwithstanding the marriage contract, remained fiar of the estate, and could execute the entail in question. Adam Craik acquiesced in this judgment. He died in January 1731, without issue male, but leaving two daughters, Mary and Grizel. The former took possession of the estate. Jan. 1731.

When their father, Adam Craik's sister, Jean, came of age, she, on the ground of having a preferable right to succeed to the estates, raised action of reduction and declarator, to have Mary and Grizel

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v.
CRAIK.21st Jan.
1734.

Craik's right to the estate set aside, and her own established under the entail executed by her father in 1723, by which she was entitled, on failure of heirs male of her brother, Adam, to succeed as *nominatim* substitute called to the succession after him. In this action, on report of the Lord Ordinary, the Court "found that the decret absolutor 1728 in favour of "the pursuer (the respondent) is *res judicata* against "the defender (appellant), and found that Adam Craik "could not, by his contract of marriage, settle the "succession in favour of his own daughters, preferably to his sister, the respondent, Jean." And on reclaiming petition, the Court adhered.

3d January,
1753.20th Jan.
1753.

The daughters of Adam Craik then contended that, as, by the entail, their father was entitled to grant them provisions, the conveyance ought to be sustained to that extent. Thus matters stood when an appeal was taken to the House of Lords on the entire case; but, before discussion, it was referred by submission, and the arbiter had pronounced a judgment precisely in accordance with that of the Court of Session, when Mary, the eldest sister, died; and her sister Grizel, then attaining majority, again raised the question by the present action of reduction, insisting to set aside the tailzie, the two decrees of the Court of Session, along with the decree arbitral, on the ground that the tailzie was in contravention of the marriage articles, setting forth the precise same grounds insisted in the reduction raised by her father. In defence *res judicata* was pleaded among others. And the Lord Ordinary, of this date, found that she could not claim the provision except on condition of homologating her grandfather's deed of tailzie; but that she might repudiate the provision. And on reclaiming petition, the Court adhered.

On the other points of the case, the Lord Ordinary afterwards “sustained the defence of *res judicata*” with respect to the reduction and other conclusions of the libel depending thereon, but in terms “of the former interlocutor, found that the pursuer was entitled to follow any remedy whereby she might obtain relief against the said two decreets, and decerned and declared.”

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v.

CRAIK.

31st Jan.
1753.

It was against the first part of this latter interlocutor that the present appeal was brought. The two previous interlocutors, together with the latter part of the above interlocutor, formed the subject of a cross appeal.

Pleaded for the Appellant:—It is the settled rule of the law of Scotland, that a provision by marriage articles to the heir male of the marriage, vests in such heir male, on the ancestor's death, an estate in fee-simple, with the usual power to dispose of it as he shall see proper. In this case, William Craik expressly bound himself, by his marriage-contract, to convey his estate to the heir male of his marriage, free from all encumbrances except his wife's jointure; and having so bound himself, he could not execute the entail he afterwards executed, and convey to the heir male of the marriage an estate in tail, instead of one in fee. That even supposing he had power to execute the latter deed, yet as by it Adam Craik the son is not thereby disabled from making onerous deeds, but only gratuitous deeds, he was entitled to make the marriage-contract, which was a deed onerous in its nature, and provided certain provisions to his family.

Pleaded by the Respondent:—William Craik was unlimited proprietor of his estate previous to his marriage-contract, and, notwithstanding that deed,

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v.
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and having due regard to the destination therein, he continued to be unlimited proprietor after he executed the same. This being the case, he had full power to dispose of his estate under such limitations as he thought fit, in so far as he did not disappoint the heir-male of the marriage, to whom he bound himself in his marriage-contract to convey. But the obligation to convey to the heir male of the marriage was substantially complied with in the disposition and deed of tailzie which he afterwards executed, and which he had full power to execute. The right conferred on the heir male of the marriage was a mere *spes successionis*, which left the father full power to regulate the succession by any subsequent deed; and in effect, instead of the tailzie being in fraud or contravention of the marriage-contract, it was in implement thereof.

After hearing counsel, it was

Ordered and adjudged that the said original appeal, and the said cross appeal, be, and the same are hereby dismissed this House; and that the said several interlocutors and parts of interlocutors therein complained of be, and the same are hereby affirmed. And it is hereby further ordered that liberty be reserved to the said Grizel Craik, the appellant in the original appeal, to take her proper remedy in the Court of Session, for a reasonable provision out of the estate in question, either pursuant to the power contained in the settlement of the 19th February 1723, or otherwise, in such manner as may be competent to her, and as shall be just.

For Appellant, *Wm. Grant, A. Hume Campbell, J. Taylor.*

For Respondent, *W. Murray, Solicitor-General*, 1753.
Alex. Lockhart. IRVINE
v.
IRVINE.

Note.—This part of the case is not reported in the Court of Session, but the previous parts are reported in M. 12195 et 12984.

ALEXANDER RAMSAY IRVINE, - *Appellant.*
 ALEXANDER IRVINE, by his Guardians, *Respondent.*

House of Lords, 10th December 1753.

MARRIAGE ARTICLES, FRAUD—PROOF.—(1) Reduction of marriage articles on the head of imbecility and fraud, sustained by the Court of Session, in respect of the suspicious and unequal nature of the whole transaction, but reversed in the House of Lords, in respect the marriage had followed thereon, and that fraud or imbecility was not proved. (2) The lady's mother was offered as a witness, but objected to on the ground of malice against the appellant. Objection repelled, and proof of reprobaters refused. (3) The physician who attended the lady's father, and who was charged with having availed himself of the opportunities which his attendance afforded, to induce the marriage settlement, rejected as a witness in support of the deed.

THE late Alexander Irvine was proprietor of the estate of Saphock. By his marriage articles with Miss Barbara Dundas, he had bound himself to provide the estate of Saphock to himself and the heirs-male of the said marriage; whom failing, to the heirs-female of that marriage, &c.

The only issue of this marriage were two daughters—Margaret, who predeceased her father, and Mary, who survived him.

Of this date he executed an entail, limiting the ^{June 30,} 1743.

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 v.
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above estate to himself in fee, and to the heirs-male of his body; whom failing, to his daughter Mary, and the heirs of her body; whom failing to the heirs-female of his own body, &c.; whom failing to the respondent, Alexander Irvine, in tail-male, &c. Reserving power to revoke and alter the said settlement.

December 8,
 1744

His only surviving daughter having been proposed in marriage to the appellant, Alexander Ramsay, nephew, and presumptive heir to Sir Alexander Ramsay, through the influence of a third party, it was agreed between the families of both that marriage articles should be drawn out, to which Mr Irvine and Sir Alexander became parties. Accordingly it was agreed that Mr Irvine should *alter* the destination contained in the above deed of entail, and convey his estates to himself and wife in life-rent, and to his daughter and the heirs-male of her intended marriage with Alexander Ramsay; whom failing to the appellant, the said Alexander Ramsay, in fee, under the condition that he and his heirs succeeding should assume and bear the name and arms of Irvine.

The marriage followed upon the signing of these articles the next day.

Mr Irvine predeceased his daughter. His daughter died soon thereafter without issue of this marriage, whereupon the estate devolved on her husband. The present action of reduction was brought by the heir-at-law and heir substitute of entail of 1743, alleging that the marriage and marriage articles were a fraudulent scheme got up by interested individuals with the sole view of diverting the succession from flowing in the channel in which it had been previously settled,—that in accomplishing this end they took advantage of Mr Irvine's age and

incapacity, when his mental faculties had become sensibly decayed, and his bodily infirmities were notorious, to make this marriage settlement,—the young lady, his daughter, showed an aversion to the whole scheme, advantage was taken of her tender years, being only eleven years of age, and the whole affair was hurriedly gone about,—the articles being signed on Saturday evening,—next day (Sunday) she was proclaimed, and on the same evening married, although she objected to proceed until her father was present.

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v.
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In defence the allegations of fraud were denied. Upon which the Lord Ordinary allowed a proof.

In the course of this proof, Lady Saphock, Mr Irvine's widow, and mother of the appellant's wife, was offered as a witness by the respondents, but this was objected to on the part of the appellant, on the ground of partial counsel, and that she bore resentment and malice against him. The resentment was denied; but the objection was repelled, and reprobaters being protested for, on appeal the Lords refused to allow proof of reprobaters; and consequently the witness's evidence was taken.

Nov. 22,
1757.

Dr Donaldson was next adduced as witness for the appellant, to whose testimony the respondent objected:—1st, That being physician to Mr Irvine he had gained a great ascendancy over him: 2d, That he had used these opportunities and his influence to prevail with Mr Irvine to consent to his daughter's marriage: 3d, That many years before Sir Alexander Ramsay had presented him to the professorship of Oriental languages in the College of Aberdeen: and, 4th, That as the Doctor was an active agent in bringing about the marriage on Ramsay's behalf, he must be suspected, and therefore an incompetent witness

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for the appellant. His evidence the Court refused to be taken.

It was proved by the respondents that Dr Donaldson availed himself of the opportunities which his attendance on Mr Irvine afforded, in concerting the marriage, while the latter was in a state of bodily infirmity and decay; while, on the other hand, it was proved from letters written by Mr Irvine at the time, seemingly with great accuracy and judgment, that he was of sound mind, and continued in this state for some months after the marriage; that he managed his own affairs with prudence and discretion; and that his daughter and son-in-law, after the marriage, had lived on terms of much harmony with him.

- Nov. 15, 1752. Of this date, the Court first found the reasons of reduction *not proven*; but on reclaiming petition
- Mar. 2, 1753. " Found the reasons of reduction relevant and proven, and therefore reduced, decerned, and declared " accordingly."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—Lady Saphock, on whose testimony the respondent Irvine did principally rely, ought not to have been admitted to give evidence in this cause; as from the reprobator offered to be proved, it evidently appeared that she entertained the most bitter enmity and malice against the appellant, and consequently she could not be considered as an impartial witness, and had sworn to facts that were contradicted by other witnesses. In like manner, Dr Donaldson's evidence—a gentleman of unblemished character, ought to have been allowed. But even as the case now stands, the reasons of reduction—namely, fraud and circum-

vention, mental and bodily infirmity—have not been proved. On the contrary, it has been established beyond all doubt that Mr Irvine was of sound memory and judgment, both before the marriage articles, and for many months thereafter; that this marriage and marriage-contract were of his own seeking, his own deliberate choice, and a subject he had much at heart. The particulars of a marriage-contract are always matter of arrangement, just as the parties agree; and whatever be the rights conferred by the one, the marriage is always considered an equivalent on the other; and no marriage-contract can be set aside on the ground of inequality. The respondent had therefore no ground, and no right in law, to question the marriage-articles, because by these articles the tailzie of 1743 (his only claim to the estate) was revoked, in terms of a power reserved therein to alter or revoke.

Pleaded for the Respondent:—The respondent has a legal title to question the alleged marriage-contract procured from Mr Irvine, which contains a revocation of his tailzie, by which the respondent was entitled to succeed to the estate. If therefore these marriage articles were obtained by fraud and imposition, from a weak and aged person, the party next entitled to succeed is the respondent, in virtue of the entail. That the marriage articles were procured in this way, is proved from the circumstances,—Mr Irvine is carried from his family to an ale-house to sign the deed, without a friend to advise him; the whole is concluded in the dark; the marriage of an only child, of eleven years of age, to a person who is a mere stranger to her, is determined; and his whole estate is conveyed to this stranger in one night. Next day the marriage was unlawfully hurried over against

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the lady's inclinations, although by the articles a year's time was allowed for reflection and advice; and this was done out of the presence of her father, and while he was labouring under great weakness:—circumstances which clearly establish fraud in the parties who were active agents in the transaction.

After hearing counsel, it was

Ordered and adjudged, that the said interlocutors of the 26th of June 1752, and the 2d of March 1753, be and the same are hereby reversed. And it is further ordered and adjudged, that the interlocutors of 15th November 1752, whereby the said Lords of Session found the reasons of reduction not proven, and therefore assoilzied and decerned accordingly, be and the same is hereby affirmed: And it is hereby declared, that the objection against the said interlocutor of the 22d November 1751, whereby the said Lords of Session refused to allow a proof of reprobation against the testimony of Lady Saphock, having been waived by the appellant's counsel at the bar; and the said interlocutor being now become immaterial; their Lordships do not think fit to enter into the consideration of the merits thereof.

For Appellant, *W. Murray, C. Yorke.*

For the Respondent, *William Grant, A. Hume Campbell.*

The Lord Chancellor (Hardwicke). He offered his opinion with the more freedom, that the question turned not on any particularity of the law of Scotland, but on fraud, which is the same in all countries and all courts. He allowed that the meeting at Gilliebrands looked ill, and justly stirred the attention of the Court of Session, and that the articles there signed appeared

harsh and unequal; but that in all his practice he never saw a total reduction or setting aside of marriage articles, where marriage actually followed; and mentioned one noted case, where that was attempted without success, though there was a strong inclination to give relief to the heir, who was of the poet Wycherley, who had an estate settled on the heir, not alterable, but a power reserved to give a jointure to a wife; and Wycherley being displeased with his heir, married a young woman on his deathbed, on purpose to load his heir with the jointure, by the means or procurement of a young man, who soon after Wycherley's death actually married the widow. Yet Lord Macclesfield, assisted by Lord Chief Justice Pratt and King, with the Master of the Rolls, after solemn hearing, thought they could give no relief."—Elchies "Fraud," vol. ii. p. 168.

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WILLIAM DOUGLAS, Esq. and THOMAS	}	<i>Appellants.</i>
BELCHES, his Trustee, -		
MRS ISABEL DOUGLAS, -		<i>Respondent.</i>

House of Lords, 25th Jan. 1754.

PRESCRIPTION POSITIVE AND NEGATIVE—CLAUSE OF RETURN.

—Held affirming the judgment of the Court of Session, that an estate which was conveyed to a party and his heirs-male, failing whom to return to the family of the Earl of Morton (the donor) had become an unlimited fee in the possessor, free of such clause of return, by his possessing for forty years, on a charter giving him the absolute fee thereof.

By charter, 6th April 1595, William Earl of Morton made a grant of the barony of Kirkness to George Douglas, his son, and the heirs-male of his body; which failing, to return to the Earl, his heirs, successors, and assigns whatsoever. Upon this charter infestment followed.

Thereafter George Douglas, then Sir George, in

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consideration of a large sum of money as the price thereof, purchased from William Earl of Morton, grandson to the former Earl, a new charter of the estate of Kirkness, "*to himself, his heirs and assigns whatsoever, heritably and irredeemably, without redemption, reversion, or regress.*" By this charter it was understood that the clause of return in his former rights was put an end to and extinguished.

But by an after contract or agreement entered into in 1638, by the said George Douglas and William Douglas his son, (who having contracted debts which were afterwards acquired by the Earl of Morton), they and the Earl adjusted mutual claims *pro* and *con.* between them, and William Douglas further bound himself to accept of a charter from the Earl conceived in terms to the said William Douglas, and the heirs-male of his own body; whom failing, *to return to the Earl, and Lord Dalkeith his son, their heirs, successors, and assigns*, and containing a clause, prohibiting to "sell, annailzie, or dispoⁿe the said lands or barony of Kirkness, in hurt, prejudice, or defraud of the said noble Earl and Lord, anent their succession to the same, failing heirs-male lawfully begotten of the said William Douglas."

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No infetment followed upon this contract; but William Douglas made up his title to the Barony of Kirkness by a special retour, as heir to his father, and after charging the then Earl of Morton to enter to the deceased Earl, that the said Earl might be in a capacity to enter him as his vassal; he upon the Earl's failure, obtained a charter from the Masters of St Leonard's College of St Andrews, the Earl's superior in these lands, in favour of *himself, and his heirs male and assigns whatsoever*, and was thus infet.

Sir William Bruce, in virtue of several apprisings of the Earl's estates, which were afterwards assigned to him, granted to Robert Douglas, William's son, a precept of clare of the lands of Kirkness, as heir to William his father, and Sir William Douglas his grandfather. He afterwards obtained a charter from Sir William Bruce as superior, in terms as follows:—To *Robert Douglas, his heirs and assignees whatsoever*, upon which he was infest, and by which he obtained an absolute estate in the barony of Kirkness, *discharged* of the provision of *return* in favour of the superior.

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The said Robert, now created Sir Robert Douglas, being involved in considerable debts, which had descended to him with the estate, did, of this date, dis-^{21st Nov. 1721.}pose the estate to General Douglas his son, and *the heirs of his body*, whom failing, to *Isabel Douglas the respondent*, and the heirs of her body; whom failing, to his other sisters successively, and the heirs of their bodies; whom failing, to his nearest heirs and assigns whatsoever.

By this disposition the estate was diverted from the line of heirs contained in the previous investiture; and William Douglas, the appellant, was the heir-male of George Douglas the first of Kirkness, entitled to succeed by that investiture, who, to try the question of his right to succeed, under the clause of return, granted a trust-bond to the other appellant, Mr Thomas Belches, who thereupon brought a process of adjudication and a reduction. The defences were, 1. That the original clause of return was discharged and altered by a charter of the next earl; and, 2. Prescription both positive and negative upon a charter to heirs and assignees in 1687.

“ On report of the Lord Woodhall, the Lords repel Feb. 3, 1753.

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“ the reasons of reduction, assoilzie from the process
“ of adjudication, and decern.”

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellants:—*That by the charter of 1595, the estate of Kirkness was given by the family of Morton as an appanage to the younger son, and the heirs-male of his body, and upon failure of such heirs-male, *to return* to the donor and his right heirs. And the contract of 1638 restored this estate to its original constitution, although in the interval it had been possessed free of this clause of return. By this deed William Douglas agreed to hold it as an appanage to him and the heirs-male of his body; whom failing, to return to the Earl of Morton and his heirs. Such being the import of both these deeds, and the intention by them being to settle Kirkness as an appanage to the second son and the heirs male of his body, it could not be diverted from that use, but must go to the heirs of the body of the second son while any such existed, and on their failure, it must return to the family. It was therefore not in the power of any of the heirs-male of the body of George or William Douglas gratuitously to alter the provisions in prejudice of the heirs-male of the family of Kirkness, so as to defeat this clause of return to the family of Morton; and the attempt to alter the original limitation by a pretended purchase or otherwise, made by Robert Douglas in 1687, by obtaining a charter on his own resignation to himself, his heirs, and assigns whatsoever, was ineffectual and void, by reason that the said Robert was not previously seized or infeft in the lands as heir of the former investiture.

*Pleaded for the Respondent:—*That no argument

could be founded upon the original grant of the estate of Kirkness in 1595 to George Douglas and the heirs-male of his body, with a return upon their failure to the Earl of Morton and his heirs; because that was entirely extinguished by the charter 1607, whereby Sir George did, for several large sums of money and other valuable considerations, purchase from the Earl of Morton a fee simple in the estate of Kirkness, that charter being taken to Sir George Douglas, his heirs, and assigns, without any limitation or clause of return to the family of Morton; and having upon this title enjoyed possession for more than forty years, so as to constitute an unexceptionable and unchallengeable title, in terms of the Act 1617, he was not liable to be disturbed in the same.

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After hearing counsel, it was

Ordered and adjudged that the said appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of be, and the same is hereby affirmed.

For Appellants, *W. Grant, W. Murray, A. Hume Campbell.*

For Respondent, *Al. Forrester, C. Yorke.*

Note.—Unreported in Court of Session. But Elchies has this note on the case. "The Lords sustained both these defences. We agreed that the charter 1595 was effectually altered, and the clause of return discharged by the charter of 1607, and that the limitations 1638, were only in favour of the family of Morton, and not of the intermediate heirs-male, there being no *jus quasi-tum*, to the intermediate heirs, otherwise Earl Morton could not have discharged it. As to prescription, I thought the charter 1687 and sasine, as they were without any limitations, a good title both positive and negative."—*Notes*, p. 378.

Mor. 4737.

<div style="text-align: center;">1754.</div> <hr style="width: 100%;"/> <div style="text-align: center;">GORDON</div> <div style="text-align: center;">v.</div> <div style="text-align: center;">HIS MAJESTY'S ADVOCATE.</div>	JOHN GORDON, Esq., second son of Sir James Gordon of Park; - - HIS MAJESTY'S ADVOCATE, - -	}	<i>Appellant.</i> <i>Respondent.</i>
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House of Lords, 4th February 1754.

ENTAIL—FORFEITURE, ALIENS.—After a party was attainted for high treason, two sons were born to him abroad. And the forfeiture of his estate was declared to endure during the lifetime of the attainted person and his issue male. A claim was lodged by a substitute heir of entail, after the death of the attainted person, but while his sons were still alive, for possession of the estate, on the ground that as the attainted person was now dead, and his sons aliens, and so incapable of succeeding, he was entitled to the estate. Held on a question of law raised by the judges in England, that as the sons were aliens, and so incapable of succeeding, the interest of the Crown had determined—reversing the judgment of the Court of Session.

SIR JAMES GORDON of Park made a settlement of his estate in the form of an entail, with a destination on himself, and after his decease on William Gordon, his eldest son, and the heirs-male of his body; and failing such heirs male, on the heirs male of Sir James' own body, with several other substitutions.

Upon Sir James Gordon's death, his eldest son William succeeded to his title and estate, but was attainted of high treason, and his estate forfeited to the Crown 1746.

The appellant preferred a claim to the estate as the next substitute called after the heirs-male of Sir William Gordon's body, and having no issue at the time of his attainder, the Lords of Session held that the barony of Park was forfeited to the Crown during Sir William's life only, and after his decease, that it goes to the appellant.

This judgment was appealed to the House of Lords, and so far altered as to hold that the estate remained forfeited to the Crown not only during Sir William's life, but so long as there remained any male issue of his body, and that then the estate devolved on the appellant, reserving his right to apply to the Court of Session for such order or direction in the premises as might seem just, on such right emerging. In applying this judgment of the House of Lords, it was afterwards discovered that Sir William Gordon, a colonel in the French service, died in Douay in France, without leaving any issue male of his body, except two sons born in France after his attainder; and the appellant, holding that as Sir William was now dead, and these sons were aliens, and so not entitled to inherit, that he was now entitled to possession of the estate as substitute. Accordingly, he petitioned the Court to that effect. Upon considering which with answers, the Lords pronounced the following interlocutor:—"The Lords having considered the petition of Captain John Gordon of Park, with his Majesty's Advocate's answers there-
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 "to, judgment of the House of Peers, and heard
 "parties, procurators thereon, they find, that Captain
 "John Gordon, the petitioner, has no right to enter
 "upon the possession of the estate of Park, during
 "the natural life of the sons of Sir William Gordon,
 "attainted; and that the estates belonging to Sir
 "William Gordon and his sons, being entirely forfeited by Sir William's attainder, the after existence
 "of a son or sons, though insisted on to be alien, cannot
 "cut off the Crown's right to make place for Captain
 "Gordon, so long as the sons live, who would have
 "succeeded to Sir William if he had not been attainted,
 "and thereupon dismiss the petition, and decern."

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1751.

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Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—The sons of Sir William Gordon, though born abroad, would have been entitled to succeed by virtue of the statute 7 Anne, c. 5, as the children of a natural-born subject; but the father being attainted of high treason at the time of their birth, they must be considered by the statute 4 Geo. II. c. 21, as aliens to all intents and purposes. And as an alien, by the law of Scotland, is incapable of inheriting by descent, the children of Sir William Gordon being aliens have no right under the settlement made by their grandfather in 1713, and are therefore incapable of succeeding. It has been adjudged that by the forfeiture the estate is in the Crown only during Sir William Gordon's natural life and that of his issue male, and as he is now dead without leaving any male issue who can inherit, the appellant is entitled to succeed. Nor can the act 7 Anne, c. 5, benefit these two sons, because the act 4 Geo. II. c. 21 has declared that the act of Queen Anne should not naturalize any children born out of the allegiance of the Crown, "whose fathers at the time of the birth of such children were liable to the penalties of high treason or felony." And as by 4 Geo. II. c. 30, those who enlist in foreign service are declared to be guilty of felony, their father was guilty both of high treason and of felony at the time of their birth, he having died in the service of a foreign state.

Pleaded for the Respondent:—The judgment on the appellant's former claim has settled the duration of the forfeiture to be "during the life of Sir William Gordon, and the continuance of such issue male of his body as would have been inheritable to the

“ said estate tailzie in case he had not been attainted,” and as it seems admitted, that if he had not been attainted, these sons would have succeeded, the appellant is not entitled to succeed so long as there is issue male of Sir William’s body. They are still alive, and not prevented from inheriting, by the mere fact of their birth in a foreign country after their father’s attainder. In other words, they are not cut off from inheriting on the ground of their being aliens, but solely because of their father’s attainder. Under the latter they lose their right to inherit, but the former circumstance could not deprive them of the benefit of the Act 7 Anne, c. 5, which expressly allows children born abroad, of natural-born subjects, to enjoy the right of natural-born subjects to all intents and purposes whatsoever.

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After hearing counsel, the following question of law being stated and proposed to the judges, viz:—

“Tenant in tail male of the lands in England, with remainder over, is attainted of high treason, and the estate tail thereby forfeited to the Crown. After the attainder, tenant in tail has issue male, born in foreign parts out of the legiance of the Crown of Great Britain, and dies leaving such issue male.”

Question:—“Is the estate or interest in the lands which was forfeited to the Crown as aforesaid, continued or determined?”

The Lord Chief Baron of the Court of Exchequer delivered the unanimous opinion of the judges present:—“That the estate or interest in the lands so forfeited to the Crown as aforesaid, is determined.”

Whereupon, and upon due consideration had of what was offered on either side of this cause, it is

Ordered and adjudged that the said interlocutors

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complained of in the said appeal be, and the same are hereby, reversed. And it is hereby declared and adjudged, that, in the event which has happened, the appellant has right to the estate and Barony of Park according to the substitution to the heirs male of the said Sir James Gordon's body, mentioned in the judgment of this House of the 21st of May 1751. And it is hereby ordered, that he be allowed the benefit of such rights, and that it be remitted to the Court of Session in Scotland to make such order, and to proceed in such manner for putting the appellant in possession of the premises, and also concerning the profits thereof, accrued since the death of the late Sir William Gordon, the person attainted.

For Appellant, *A. Hume Campbell, C. Yorke.*

For Respondent, *D. Ryder, William Grant, William Murray.*

Note.—*Vide* first branch of this case, *Craigie v. Stewart*, p. 508. As the grounds of the decision in that branch of it are not given, they are here inserted.

Lord Chancellor (Hardwicke),—"I am sorry to be obliged to differ from the unanimous decree of the Supreme Court in Scotland, so much entitled to our respect. But the learned senators of the College of Justice are not very familiar with our law of treason which has been introduced into their country, and they may unconsciously be inclined to adhere to the law which they had to administer before the Union. I do not see how the attainer of the heir of tailzie in possession can be considered as equivalent to his death without issue. He is not a mere tenant for life; he is the 'fiar:' the fee is in him, and our doctrine of remainders and reversions does not strictly apply;—so that, on a rigid construction of the 7 Anne, c. 21, on his attainer, there is room for contending that there ought to be an absolute forfeiture to the Crown of the entailed lands, to the entire extinction of the rights of all substitutes in the entail. But the milder interpretation of the act will be to hold that the heir of tailzie has in him,

and forfeits by his attainder, the same interest as tenant in tail in England—so that upon his attainder the Crown takes the lands during his lifetime, and while there exists issue who would take by descent through him—leaving other substitutes in the entail unaffected. I would, therefore, advise your Lordships, reversing the interlocutor appealed against, to declare that the barony of Park is forfeited to the Crown during the life of Sir William Gordon, and during the existence of issue male, who through him would be inheritable thereto—but that upon his death and the extinction of such issue, the remainder in favour of the respondent, Captain James Gordon, will take effect.”*

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Lord Chief Baron (Parker,)—“ My Lords, At common law estates in fee simple, whether absolute or conditional, were forfeited for treason. By the statute of the 13 Edw. I., (commonly called the statute of De Donis,) the forfeiture of lands entailed even in case of treason was taken away; the reason of which will be best collected from the words of the statute, ‘ Quod voluntas donatoris, secundum formam in charta doni sui, de cetero observetur; ita quod non habeant illi, quibus tenementum sic fuerit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum quibus tenementum sic fuerit datum, remaneat post eorum obitum, vel ad donatorem, vel ad ejus heredem (si exitus deficiat) revertatur.’

“ Therefore, my Lords, the will of the donor, according to the form expressed in the deed of gift, was to be observed; so that they to whom the land was given under such conditions, should have no power to alien it, but that it should remain to their issue after their death, or should revert to the donor for want of issue.

“ By the express words of the statute they could not alien, by construction they could not forfeit or charge; and the express and constructive restraints stood upon one and the same reason, which was, That either alienation, forfeiture, or charge, was inconsistent with, and would have defeated, the provision and intent of the statute.

“ And the reason given by the counsel for the respondents, in the original appeal, That entailed lands were not forfeitable for treason, because they were unalienable is not well founded; because they were alienable when they were not forfeitable for treason.

“ For notwithstanding the strong words in the statute De Donis,

* Lord Campbell's *Chancellors*, vol. v. p. 61.

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in Taltarnum's case, in the 12 Edw. IV. an alienation of entailed lands by a common recovery obtained judicial allowance, and has been so practised ever since; and by the 4 Henry VII they might be aliened by fine with proclamations; and yet the statute De Donis protected them from forfeiture for treason till the making of the statute of the 26 Henry VIII. c. 13.

"By that statute, lands entailed became forfeited for treason under these words, *all such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance*; and the reason was, because this statute, being subsequent to the statute De Donis, repealed it in this case: and the construction that these words should operate upon entails, was extremely right, as they otherwise could have no operation at all, because all other estates of inheritance (as I have shown already) were forfeited for treason by the common law.

"I will now show your Lordships that entailed lands, though unalienable beyond all question, were yet forfeited to the Crown for treason. If the king made a gift in tail, saving the reversion to himself, the attainder of treason of such tenant in tail did not bar his issue; because the statute of 34 Henry VIII. c. 20, enacts, That the heir of entail in such case shall have the lands; any recovery, or any other thing or things hereafter to be had, done or suffered by or against such tenant in tail, to the contrary notwithstanding.

"Which act coming after the 26 Henry VIII. that gave the forfeiture of lands entailed, was a repeal of that statute, and a restitution of the statute De Donis in this special case.

"But the statute of the 5 & 6 Edw. VI. cap. 11, enacts, That every offender being lawfully convicted of any manner of high treason according to the course and custom of the common law, shall lose, and forfeit to the King's Highness, his heirs and successors, all such lands, tenements, and hereditaments, which any such offender or offenders shall have of any estate of inheritance, in his own right, in use or possession, within this realm of England, or elsewhere within the King's dominions, at the time of such treason committed, or at any time after.

"This act coming after 34 Henry VIII., has repealed it *pro tanto*, and made lands of the gift of the Crown in tail, subject to forfeiture for treason as well as other lands entailed. This has been taken to be law from the time of making the act; and there is no colour for the observation made at the bar, That it depended singly on Lord Hales' opinion; though if it had done so the authority would have been very great. I now proceed

to the most material act for your Lordships' consideration on this occasion, the Act of the 7 Queen Anne, cap. 21, for improving the Union of the two kingdoms.

" This act recites the benefit that would accrue to the United Kingdom from the provisions of it. Enacts, That such crimes and offences which are high treason or misprison of high treason within England, shall be the same in Scotland, and no other.

" And that the offenders shall be indicted and tried in the same manner as in England; and that all persons convicted or attainted of high treason or misprison of high treason in Scotland, shall be subject and liable to the same corruption of blood, pains, penalties, and forfeitures, as persons convicted or attainted of high treason, or misprison of high treason, in England: provided always that where any person now is, or shall be before the 1st of July 1709, seized of any lands, &c., in Scotland of an estate tail that is to say, an estate tailzie affected with irritant and resolute or prohibitive clauses, and is or before the 1st day of July shall be married, if any issue of that marriage be living, or there be possibility of such issue at the time of the high treason committed; that then, and in such case, the said lands, &c., shall not be forfeited upon the attainder of such person for high treason, but during the life of the person so attainted only; so that the issue and heirs in tail of such marriage shall inherit the same, the said attainder notwithstanding.

" This act, by reference, re-enacted, and extended to Scotland, all the laws of England concerning treason which were then in force as strongly and effectually as if they had been transcribed into the body of it; and as at the time of making the act, all the estates of inheritance were and still are forfeited for treason, we think upon the supposition in your question, that an estate tailzie, with prohibitive, irritant, and resolute clauses, is an estate of inheritance, and that such an estate of inheritance is forfeited; for otherwise the forfeitures in England and Scotland would not be the same, though the act expressly requires they should be so.

" But it was objected by the learned counsel for the respondent, That by the Scotch Act, 1685, estates tailzie, with prohibitive, irritant, and resolute clauses, were unalienable; and by the Scotch Act of 1690, it is provided, That no forfeiture should prejudice the heirs of entail therein mentioned, provided the right of entail was duly registered: from whence it was inferred that Sir William Gordon could only forfeit for his life.

" But, my Lords, we are humbly of opinion that the Act 7

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Anne being subsequent to these Scotch Acts, has repealed them *pro tanto*, in the same manner as the 5 & 6 of Edw. VI. repealed 34 Henry VIII. which made lands of the gift of the Crown in tail unalienable; and that this estate tailzie is therefore subjected to forfeiture, that the forfeitures throughout the United Kingdom may be the same.

"But it was objected by one of the learned gentlemen, That the third clause which gives the forfeiture would not have induced a forfeiture of this estate-tailzie, without the aid of the proviso; and that the proviso, which only imports an exception, ought not to extend the construction of the foregoing clause.

"But, my Lords, we are humbly of opinion that the clause which gives the forfeiture, would have induced a forfeiture of this estate tailzie, though the proviso had been omitted out of the act; and we agree, that the proviso ought not to extend the construction of the foregoing clause.

"But as the proviso is in the act, and the respondent's case is not the case described in the proviso, *exceptio firmat regulam in casibus non exceptis*, and greatly strengthens the construction we put upon the act.

"As to the reversion in fee, or clause of return, supposing that by the law of Scotland it was in Sir William Gordon at the time of his attainder, we think that to be so clearly forfeited, that it would be wasting your Lordships' time to attempt to prove it. But as to the substitution or limitation to the heirs male of Sir James Gordon, and the intermediate substitutions or limitations between that and the reversion in fee, upon the supposition in your Lordships' question, that no estate or interest was thereby vested in Sir William Gordon, we are humbly of opinion that no estate or interest derived under any of these intermediate substitutions or limitations is forfeited to the Crown by the attainder of Sir William Gordon; because the substitutes claim as persons described, and their estate or interest successively is to be considered as a new acquisition, which can be no more forfeited by the attainder of Sir William Gordon than a remainder limited after an estate tail in England can be forfeited by the attainder of the tenant in tail for treason.

"Besides, there is a saving in the Act of 26th Henry VIII. to all persons (other than the offenders, their heirs and successors, and such persons as claim to any of their uses) of all such *right*, title, interest, &c., as they might have had if the act had not been made.

“ And in the vesting act of the 20th of his Majesty’s reign, there is a saving to all persons (except the forfeiting persons, their heirs, executors, administrators, and assigns, and persons claiming to their use, or in trust for them) of their estate, right, title, interest, trust, possession, reversion, remainder, and so on. 1745.
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“ And we are humbly of opinion that the saving words in these acts, and particularly the word *right*, are sufficient to preserve the several estates or interests of the substitutes in this settlement from forfeiture.”

Lord Chancellor (Hardwicke) further explains the reasons of the judgment in a letter to Lord Kames as follows:—“ That you may the more clearly see the grounds whereupon the House of Lords proceeded, I take the liberty to inclose a copy of my Lord Chief Baron Parker’s argument in delivering the opinion of the Judges in the House of Lords upon the question proposed to them, together with a copy of their Lordships’ order taken from the journal. I found some difficulty in stating my question, so as to avoid making the English Judges judges of the Scotch law, (which would have been highly improper,) and simply to refer to them the main point arising from the construction of the Act 7 Anne. For this reason I was forced to frame the question hypothetically, and to insert two suppositions of points merely of your law, reserved for the determination of the House, and which were determined by the opinion of the Lords, given in the debate, after the Judges had been heard. All the Lords concurred, that, by the law of Scotland, an estate tailzie with prohibitive, irritant, and resolute clauses, is an estate of inheritance; and that by the same law no estate or interest in the lands was vested in Sir William Gordon by virtue of the limitation in the settlement of 19th October 1713, to the heirs male of the body of Sir James Gordon; though that would have been clearly otherwise by the rules of the law of England. The question put to the English Judges was reduced purely and simply to the construction of a statute of the Parliament of Great Britain, which it is equally the office of the King’s Courts in both parts of the United Kingdom to expound; and every thing that could make a point in the Scotch law, was kept apart from the decision of the Lords, the proper Judges of it.

“ To repeat the several reasons of the judgment in the cause of Park would swell my letter too much; but I will fling out two or three ideas.

“ 1. My foundation was the express declaration of the legisla-

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ture in the preamble of the Act 7 Anne, which is the basis of the subsequent enacting clause, 'That nothing can more conduce to improving the union of the two kingdoms, than that the laws of both parts of Great Britain should agree *as near as may be*, especially those laws which relate to high treason, and the proceedings thereupon, as to the nature of the crime, the method of proceeding and trial, *and also the forfeitures and punishment for that offence*, which are of the greatest concern, both to the Crown and to the subjects.'

" 2. The enacting clause relative to this subject, is penned in words still more general, and therefore the question must be a question of construction and exposition, wherein, though the proviso immediately following cannot extend or superadd to the enacting clause, it must be allowed to explain and illustrate the meaning of the words.

" 3. That judges are obliged to make that construction which will best attain the declared intent of the legislators, provided the words of the law will bear it; and therefore that such a construction as would produce the greatest equality between England and Scotland, in forfeitures for treason, must be the true construction.

" 4. In this I felt the force of the difficulty arising from the difference between the nature of your strict Scotch entails with substitutions, and our English entails with remainders over, which you have so clearly explained, viz., That in the former every person called to the succession is considered as an heir, and has the fee in him; in the latter, the fee or estate in the land is broken and divided into distinct parts. But then I considered what was to be allowed as the consequence of this diversity between the two laws. Was a tenant in tail, although admitted to have an estate of inheritance descendible to his issue, to forfeit only for his life? or was every tenant in tail, by reason of being invested in the ideal fee, to forfeit not only for himself and his issue, but also for all the substitutes?

" Either of these would plainly destroy the equality in forfeitures professed to be established by the Legislature, and not only contradict the intent of the act, but also the express words of the preamble.

" The knot lay here. To avoid forfeiting the whole fee—for as your law places that fee in every tenant in tail, and don't admit of a division of it into particular estates and remainders, there was more colour from legal reasoning to carry it to *that large extent*, than to make a man who had a fee in him to forfeit

for his life only. But I could not satisfy my own mind that this *large extent* was either agreeable to the intention of the Legislature, or a just and equitable measure between the two nations.

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" 5. How was this to be avoided? By expounding the act by *analogy*. And if you will apply your usual penetration to this point, you will find that there is often no other possible way of making a consistent sensible construction upon statutes conceived in *general words*, which are to have their operation upon the respective laws of two countries, the rules and forms whereof are different.

" These general words will probably always be taken from the language or style of one of these countries, more than from the other, and not correspond equally with the genius or terms of both laws. You must then, as in other sciences, reason by *analogy*, or leave at least one half of the statute without effect. This head of the argument from *analogy* is not unknown in the law of England. It was long since established upon the statute, *De donis conditionalibus*, 13 Ed. I., which enacts, that a fine levied by tenant in tail shall be *ipso jure nullus*. Stronger words could not be found in the concise words of those ancient laws, to render such a fine an absolute nullity. But what said the Judges when they came to construe this act? They said, it should be construed by the reason of the common law, (i. e. by *analogy* to that law.) That the question was to create a disability in some persons, to alien to the prejudice of others, and the common law took notice of such disabilities; and, for that reason, a tenant in tail ought to be ranked with ecclesiastical persons seized in right of their churches, or husbands seized in right of their wives, who, by the common law, were disabled to alien to the prejudice of their successors or their wives. That therefore the fine should not be a nullity, and merely void, but should work a discontinuance, take away the entry of the issue, and drive him to his proper action to recover the land.

" There are other instances of the like nature in our law; but I am aware that to these it might be objected, that it was reasoning by *analogy* from one part of the law of England to another part of the law of the same country, which is not the present case. I think that doth not weaken the example.

" The rules of construction upon acts of Parliament are, in many respects, the same with those upon wills; and by the construction made in the case of Park, the words of the preamble of the Act 7 Anne, which is the key to the meaning of the legis-

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lators, are strictly complied with, viz., 'That the laws of both 'parts of Great Britain should (as to forfeitures for treason) 'agree as near as may be.' And the world must allow that the favourable side for Scotland was chosen."

"But though by this decision the like force is given to such substitutions in your tailzies as to English remainders, yet they are by no means turned into remainders to any other purpose, but are to be governed by the rules of the law of Scotland to every other effect; and therefore you express yourself with strict propriety when you say, that *by this judgment a remainder is introduced into our law with respect to forfeiture only.*"—Letter dated 12th July 1757. Kames, El. p. 381.

[M. 14431.]

MRS KATHERINE MAITLAND,	-	<i>Appellant.</i>
MAJOR FORBES, (<i>et e. contra,</i>)	-	<i>Respondent.</i>

House of Lords, 12th February 1754.

ENTAIL—HEIR-FEMALE—SERVICE.—1. Held restrictions of entail only to apply to the heirs-female. 2. Also held, that a retour of service bearing that the party was served nearest heir of tailzie in general was good, though it did not mention to what estate, or by virtue of what deed of tailzie, and carried right to every subject in that character.

No. 105. SIR CHARLES MAITLAND of Pitrichie being seized of the lands of Pitrichie in fee-simple, descendable to heirs-general, executed an entail of this estate. By this deed of entail he resigned his lands in favour of himself in liferent, and to Charles Maitland, his only son, in fee, and the heirs-male to be lawfully procreated of his body, and the heirs-male of their bodies; which failing, to any other heir-male to be procreated of his own body; which failing, to the heirs-female to be lawfully procreate of the said Charles Maitland's body, and the heirs-male of

20th Jan.
1700.

their bodies, (the eldest daughter or heir-female always succeeding without any division); which failing, to Jane Maitland, his eldest daughter, and the heirs male to be lawfully procreate of her body; which failing, to Mary Maitland his second daughter and the heirs male to be lawfully procreate of her body; which failing, to Margaret Maitland his third daughter, and so on through the other daughters in same terms.

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He reserved full powers to alter or to burden; and in the event of the estate coming to his daughters, he imposed this condition, "that they should be obliged to marry a gentleman of the Reformed Protestant religion, who is not cousin-german to her, nor within the forbidden degree, of the surname of *Maitland*, and bearing the arms and family of *Pitrichie*." And if they marry a gentleman of any other name, they shall assume the name and arms of *Maitland*; and their not doing so, and not marrying a person of the Reformed Protestant religion, is thereby declared a contravention, and forfeiture, of all title to the estate. It had also this proviso:—That it should not be lawful "to any of my daughters or heirs female," who happen to succeed, "to sell, annailzie, or dispoise the same, nor to wadset or impignorate the lands, nor to burden the same with any sum of money above 20,000 merks." And if the estate became burdened by the previous heir with this sum, then they were strictly prohibited from burdening it with any further sum.

The entail was recorded during Sir Charles' lifetime; and he soon thereafter died, without altering the tailzie.

His son Charles, now Sir Charles Maitland, succeeded him, and by deed of this date he ratified and April 1, 1703.

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confirmed this tailzie. He then obtained a charter under the Great Seal, proceeding upon his father's procuratory of resignation and tailzie, but died soon thereafter *without being infest*, and without issue male or female.

May 5, 1704. The estate then devolved upon Jane Maitland, the appellant's mother, as the entailer's eldest daughter and heir-female under the entail. She was served and retoured heir of tailzie *in general* to her brother, whereby she had right to her brother's charter, and to the unexecuted precept of sasine therein contained, and of this date took infestment on it. It is the regularity of this service that forms the question in the cross appeal.

May 24,
 1704.

Jean Maitland married a son of Lord Arbuthnot, who complied with the conditions of the entail, in so far as taking the name and wearing the arms of Maitland were concerned. She survived her husband, having issue with him, a son, Charles Maitland, advocate. Of this date she disposed to him and the heirs of his body; whom failing, to return to herself, and to any other heirs-male to be procreate of her body; which failing, to the heirs-male of the body of her sister Mary, second daughter of the deceased Charles Maitland of Pitrichie, elder, &c., the lands of Auchincrieve and Skillmannell, being parts of the tailzied estate; and upon this deed Charles Maitland

June 8, 1733.

1746. was infest. She died in 1746, leaving this son and two daughters, Katherine the present appellant, and Ann Maitland.

In making up his title to the estate, it occurred to Mr Maitland that the limitations in the entail of his grandfather, Sir Charles, were only imposed upon daughters and heirs-female, and as he was not an heir-female but an heir-male, the two restrictions against

marrying a gentleman of the name of Maitland, and not to sell or charge the estate with debt, did not apply to him, he, in taking out a retour for service, did not insert these limitations in the same; and upon this retour, so taken by a precept from the Chancery, he was duly infeft.

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In 1747 he then made a new settlement in favour of himself and the *heirs whatsoever*; whom failing, to the appellant, Catherine Maitland, his eldest sister, and the heirs of her body; whom failing, to Ann Maitland, his youngest sister, and the heirs of her body; whom failing, to the respondent Captain Arthur Forbes, the eldest son of *Mary* Maitland *his mother's* immediate younger sister, and the heirs-male of his body, &c.

Charles Maitland, the maker of this last settlement, died in 1751, without issue, whereupon the appellant, his eldest sister, entered into possession of the estate; but her possession was contested by Major Forbes, as heir-male of *Mary*, the entailor's second eldest daughter, who claimed to succeed preferably to the heir-female of *Jean*, the entailor's eldest daughter.

Mutual declarators being brought, Major Forbes maintained, 1st, That Mr Charles Maitland was affected by the limitations of the entail, and could not alter it, or introduce a new destination into the succession. 2^d, That Jean Maitland's retour of service as heir of tailzie in general to her brother was inept, as it did not mention what particular tailzie, the date thereof, or describe the lands entailed; and her brother might have had other entails; and no parole evidence was competent to supply this defect in the retour.

The appellant maintained in answer, 1st, That the limitations of the entail were only laid on *daugh-*

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ters or *heirs female*, and not on *heirs male*, which Charles Maitland undoubtedly was; and the prohibitions against altering the succession or contracting debt did not affect him. 2d, That it was not necessary the retour of service of Jean Maitland should set forth in virtue of what deed of tailzie she claimed to be served, to specify the date thereof, or the particular estate to which she claimed to be served heir of tailzie. That it was sufficient the excerpts produced from the Bailie Court established, that the entail in question was produced before the inquest in the service, and shown to the jury. Besides, this title was fortified by the vicennial prescription of retours, and the positive prescription with forty years' possession.

July 13,
1753.

On report of the Lord Ordinary, the Court, of this date, pronounced this interlocutor:—" The
" Lords having heard the report of Lord Shew-
" alton, of the procedure before the macers and
" their assessors, in the service of Major Arthur
" Forbes, as heir of tailzie to Sir Charles Mait-
" land his uncle, and in the other service as heir
" of tailzie to Mr Charles Maitland his cousin, writs
" produced, excerpts of retours taken from the re-
" cords of chancery, and parties' procurators there-
" on, they (by the opinion of ten judges against two)
" repel the objections to the general retour of the
" service of Mrs Jean Maitland, as heir of tailzie to
" the deceased Sir Charles Maitland, her brother,
" and find, that the said general retour did carry
" the procuratory in the tailzie 1700, and ratifica-
" tion and settlement 1703, and charter following
" thereon: And that therefore the said Major Ar-
" thur Forbes cannot be served heir of tailzie to his
" uncle Sir Charles: But find, that Mr Charles
" Maitland, advocate, could not gratuitously alter

“ the destination of the succession to the estate to
 “ Pittrichie, settled by Sir Charles Maitland, his
 “ grandfather, by the said tailzie 1700, and by his
 “ uncle Sir Charles’ ratification and settlement 1703,
 “ and charter following thereupon, in prejudice of
 “ Major Arthur Forbes the purchaser of the brieve;
 “ and that the deed granted by the said Charles
 “ Maitland, advocate, to himself and his sisters, can-
 “ not bar the said Major Arthur Forbes from prose-
 “ cuting his brieves, and being served heir of tailzie
 “ to the said Mr Charles Maitland, his cousin. And
 “ decern and declare accordingly.”

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On reclaiming petition the Lords adhered.

Aug. 9, 1753.

Against these interlocutors the present appeal was brought by the appellant, in so far as they decide against her right to the estate, in preference to Major Forbes.

*Pleaded by the Appellant:—*By the law of Scotland, every proprietor or fiar of an estate tailzie is at liberty to alien and charge the tailzied estate, unless he be expressly prohibited from so doing by the entail itself. By the deed in question it is manifest that the maker intended to favour male-heirs over female, and the whole scope of the deed is directed to this object. It is equally clear to have been a part of his intention, not to make a perpetual or unalterable line of succession, in so far as these male heirs were concerned; and the favour he shows them is precisely this, by leaving them free and unlimited possessors, while the real limitations are only imposed on the heirs-female. The terms, heirs-female, are here descriptive of daughters, and in contradistinction to males descended of daughters. It is not denied that this is the meaning in which the maker understood the word daughters. Thus

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then the restriction from selling or burdening is imposed upon them alone, just as the restriction of marrying a Protestant gentleman of the name Maitland, and also the prohibition against burdening the estate beyond 20,000 merks, is alone directed against them. Nor does there lie any objection to the general retour by which the appellant's mother was served heir of tailzie to her brother, as it was quite in accordance with practice, to serve heir of tailzie in general, without mentioning therein the particular deed of entail, or the lands claimed, and consequently the procuratories 1700 and 1703, were sufficiently carried by such service. Besides, when regard is had to the fact that by the extract produced, it is proved, that the tailzie itself was produced before the inquest; and when it is considered that the act regarding the prescription of retours bars all exceptions after twenty years; and also the possession had upon the title for more than forty years, this ought to be conclusive of her right.

Pleaded for the Respondent:—It is admitted by the respondent that the restrictions of the deed of entail of 1700 are not imposed on the heirs-male, but only on the heirs-female. Mr Charles Maitland, advocate, was in law an heir-female, and *not* an heir-male; because he was descended of a daughter, or heir-female. Being, therefore, one of the heirs-female, he was one on whom the restrictions of the entail were imposed, and consequently debarred from altering the succession arranged by the entail. And in regard to the general service of Jean Maitland, it is quite a settled rule in our law, that there is no *ipso jure* transmission of rights from the dead to the living. Until, therefore, the estate is taken out of that person, by an infeftment following upon

titles regularly made up, the estate must remain in *hæreditate jacente* of that person who died last vest and seized. The service by her to her brother Sir Charles was therefore inept from uncertainty, because it does not specify to what estate, or by virtue of what deed, he claimed to be served; and therefore the service of Major Forbes, as heir of tailzie to his uncle the said Sir Charles, was competent, and ought to be sustained, as well as the service to his cousin Charles Maitland.

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After hearing counsel, it was

Ordered and adjudged, that the said original appeal and the said cross appeal be, and the same are hereby dismissed this House; and that the said interlocutors therein complained of, be, and the same are hereby affirmed.

For Appellant, *Wm. Murray, A. Hume Campbell.*
For Respondent, *Wm. Grant, C. Yorke.*

Note.—Lord Elchies has an elaborate note on this case, *vide* “Retour,” Elchies’ Notes, vol. ii. No. 3. On the objection to the retour he says, “Some were of that opinion because of the forty years’ prescription; others because of the excerpts, which I thought signified nothing in this question.”—See also Kames’ Dec. p. 53. See *Cathcart, v. E. of Cassils*, 16th Nov. 1802 (M. 14447) as affirmed in part and remitted with instructions from the House of Lords (1805) and finally held in the Court of Session when considering this remit (1807), that a general service, as “heir of line, and heir-male,” not being equivalent to a service as heir of provision, could not connect with a particular deed, which destined the estate in favour of a certain series of heirs. There seems, after it was so adjudged by the Court, to have been a second appeal in this case, where the judgment of the Court of Session was in part struck at, as unwarranted by the former remit:—viz.

9th May 1810. “The Lords find, that it was not the intention of this House, in its order of 24th May 1805, either specially or generally to remit to the Court of Session to review their

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"interlocutors with regard to the lands of M'Gowanston, Mill of Drumgairlock, Dennymuck, Whitestone, Pennyglen, barony of Greenan, and lands of Balvaird, and that the Court of Session were not authorised to review their interlocutors with relation thereto, by the said order of this House, and that such parts, therefore, of the said interlocutors of the Court of Session of the 10th of February and 24th November 1807, as have relation thereto, being unauthorised by the remit of this House, are null and void (being the parts of the interlocutors which are unfavourable to the appellant Blane) (Cathcart's trustee), and as such complained of in his appeal, and with this declaration, It is ordered and adjudged that the appeal be dismissed."—*Vide case infra.*

[M. 15459.]

SIR KENNETH MACKENZIE, Bart., - *Appellant.*
 JOHN STEWART, Esq., and OTHERS, *Respondents.*

House of Lords, 14th March 1754.

ENTAIL—ACT OF PARLIAMENT—FRAUD.—An entailed estate was sold for payment of debts by Act of Parliament applied for and obtained with the concurrence of the appellant and others, substitute heirs of entail. Held (reversing the judgment of the Court of Session), that the appellant was not barred by such concurrence and agreement, nor by the Act of Parliament, from opening up the whole proceedings, and showing that the debts fraudulently represented as due, were fictitious and not chargeable against the estate.

No. 106. THE Earl of Cromartie, then Viscount of Tarbat,
 November 28, of this date executed an entail of the lands and
 1688. barony of Roystoun, in favour of himself and his
 lady for life; whom failing, to his third son, Sir
 James Mackenzie, and the heirs male of his body;
 whom failing, to his second son, Sir Kenneth Mac-
 kenzie, and the heirs male of his body, with several
 other substitutions over.

The entail contained the usual prohibitory, irri-
tant, and resolute clauses. Infertment was passed
upon it, and it was recorded in the register of tail-
zies. The maker did not reserve any power either
over the estate or the succession; but the heirs of
entail in possession had power to jointure their wives
to a limited amount, and to charge the estate with
portions for younger children, not exceeding four
free years' rent, and Sir James and the other heirs
succeeding to the estate were taken bound to pay to
the Earl's eldest daughter, Lady Anne Mackenzie,
the sum of 20,000 merks, with 2000 merks of pen-
alty, and interest from their death, conform to bond
of provision granted her. This debt, which was the
only encumbrance on the estate, was afterwards paid
and extinguished by the father.

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Yet these extinguished claims of debt were, along
with other fictitious claims, made the foundation of
a scheme, formed by the Earl and his son, Sir James,
to break this entail of Roystoun.

The Earl having only then a liferent interest in
the estate, with no power to burden for debt, he, in
conjunction with his son, granted an heritable bond
upon the estate for 8250 merks. And on the 9th
April following, conceiving that he had the full fee of
the subject still in him, he granted a new disposition
of the said estate to his son Sir James, in fee-simple,
without any limitation, and without taking any notice
of the entail. A bond was also granted at same time,
but antedated, to his daughter Lady Anne, for her
20,000 merks, made payable at Whitsunday 1689, with
interest from that date, instead of making it payable
and interest to run from the Earl and Countess'
death. This fictitious bond Lady Anne was made
to assign to her uncle, Lord Prestonhall. And on

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1706.
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 STEWART. the same day Lord Prestonhall granted a declarator of trust to Sir James Mackenzie, obliging himself to assign the same bond to Sir James, that he might use diligence against the estate of Roystoun.

1739. After the Earl's death, Sir James succeeded, and possessed until 1739, when the Duke of Argyle offered a very inviting price for the purchase of the estate. The question was how they were to sell so as to give an unexceptionable title? The plan adopted was by going to Parliament, and on the representation that the entailed estate was exhausted with debt, obtaining an Act of Parliament to sell for payment thereof. To this Sir James Mackenzie obtained the concurrence of his only son, Sir George, and of Sir George Mackenzie, the eldest son of Sir Kenneth, the two first substitutes.

An act was obtained accordingly, but it was carefully concealed that these claims were fictitious, and that Sir James Mackenzie had an interest in the said two debts, he representing them all along to belong to *bona fide* creditors.

The next substitute, Sir George Mackenzie, son to Sir Kenneth, having afterwards discovered the fraud perpetrated by his uncle, brought an action jointly with his brother Gerard against the respondent, as representing his grandfather, and against the trustees on the Act of Parliament so obtained, for an application of the residue of the purchase-money after payment of just, true, and lawful debts really affecting the entailed estate of Royston. In defence, the respondent objected that he was barred from raising this question by the agreement he entered into with reference to the sale of the estate under the Act of Parliament, and his concurrence therein.

January 20,
 1747.

The Lord Ordinary, of this date, held Sir George

not barred by the agreement from proving that the debts were fictitious. 1754.
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But the interlocutor was altered by the Court, who "Found that those debts that by the Act of July 1, 1752. " Parliament are appointed to be paid out of the " price of the estate of Royston, must be stated to " exhaust the said price; and that the price of the " estate being exhausted by these debts, there is no " ground for a further compt and reckoning. And " therefore assoilzie and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—The appellant is not barred by his agreement or concurrence to the sale by Act of Parliament, because that was given on the faith that debts, said to be debts against the estate, were real debts *bona fide* due to the creditors therein, and burdens on the estate, whereas they turn out to be fictitious; and having therefore been drawn into such consent by the misrepresentation of Sir James Mackenzie, and this Act of Parliament having been obtained upon such fraud and misrepresentation, he is not bound by the same, nor excluded as a substitute, from inquiring into the reality of these claims, because, if they are fictitious, the whole residue or price will then belong to him. Even supposing them real, it is clear, from the conception of the entail, that they could not be a burden on the estate of Royston. Lundirie's heritable bond could not be so, because there was no power to burden the estate with debt; and in regard to the 20,000 merks of provision, it is equally evident that this claim was already extinguished, and only again fictitiously raised up with accumulations of interest, in order to effect their purpose. Neither the trustees under the act obtain-

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ed, nor Sir James, could retain more of the purchase money than was really and *bona fide* applied, in discharging the incumbrances supposed by the act to affect the estate. If, therefore, there was none such in existence; or if these creditors had compounded, or agreed, to take less, or agreed to take nothing at all, in either case, the appellant as substitute would be entitled to the benefit, and an eventual estate left free to descend to him. But assuming the debts to have been real debts, it was clear in law, that Sir James, during his possession, was bound to keep down the growing interest on these debts.

Pleaded by the Respondent:—The debts affecting the entailed estate specified in the Act of Parliament, must be taken as they are recited therein, especially in questions between those who were concurring parties to that act; for though there is a saving clause inserted to protect the rights of those who are not parties, yet it is a binding law to those who are, and consequently on the appellant. That act was obtained with the consent of the heirs of entail, and particularly the appellant, who had full opportunity to inform himself as to the reality of the debts now impugned. These heirs of entail received a valuable consideration for their concurrence; and are therefore now barred from opening up the question.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be, and the same are hereby, reversed; and that the interlocutor of the Lord Ordinary of the 20th January 1747 be, and the same is hereby, affirmed. And it is further ordered that the Court of Session do proceed thereupon according to justice, and the rules of that Court, without prejudice to any question that

may hereafter arise concerning the relief to which the appellant may be entitled, against what persons or subjects such relief (if any) ought to be extended.

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For the Appellant, *W. Murray, Alex. Forrester.*
For the Respondent, *A. Hume Campbell, C. Yorke.*

Note.—"The Lord Chancellor in delivering his opinion expressed a good deal of indignation at the fraudulent means of obtaining the act; and said that he never would have consented to such private acts, had he ever entertained a notion that they would be used to cover frauds."—*Kames' Dic.* p. 7445.

[M. 2430.]

JOHN STIRLING of Herbertshire, in the	}	<i>Appellant.</i>
County of Stirling, Esq., -		
ARCHIBALD CAMPBELL, younger of	}	<i>Respondent.</i>
Succoth, Esq., - - -		

House of Lords, *2d April 1754.*

WADSET.—Proper and improper Wadset, difference between them in law, and also as a title for voting.

CAPTAIN CAMPBELL claimed to vote as one of the No. 107. freeholders of the county of Stirling, under a title which was objected to as insufficient. This title was a wadset entered into by William Stirling and his ancestor whereby, in consideration of the sum of L.82, the former sold and disposed to the respondent's ancestor, the lands of Gunnershaw and others within the county of Stirling for twenty-one years, redeemable thereafter. Upon this he was infest in the lands so disposed, consisting partly of property and partly superiority.

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The appellant objected, that the respondent's wadset being an improper one, and not a proper wadset, which alone gave a freehold qualification, contended, that he had no right to be placed on the roll of freeholders: that contracts of wadsets were of two kinds, proper and improper. The proper wadset is that by which the disponee takes possession of the lands for the use of the money, and is not accountable for the rents, but retains them for payment of his interest, and takes the hazard of them in all events; or as it is expressed in the Act of Parliament 1661 c. 62, "where the creditor wadsetter hath the hazard of fruits, tenants, war, and others." The improper is that wadset whereby the wadsetter is liable to account for the rents, and to impute the surplus, over paying the interest of the debt, in extinction *pro tanto* of the principal sum. The former, therefore, is a right of property, the latter a mere right in security, and so ineffectual to give a right to vote.

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The Court of Freeholders having dismissed the respondent's claim, he brought a petition and complaint to the Court, complaining of that sentence. The Court pronounced this interlocutor:—"Find that the complainer's right is a proper wadset, and the lands therein mentioned are properly conveyed, as well those whereof the feu-rights of the vassals were excepted, as those whereof the property was conveyed? Find that the lands were regularly divided, and the valuation of the half thereof made in the year 1740, and was confirmed by a subsequent meeting of the Commissioners of Supply in the year 1753, and therefore repel the objections to the complainer's title as to these points.

Against this interlocutor the present appeal was

brought by the appellant, the party objecting to the respondent's title.

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Pleaded for the Appellant:—The greatest part of this wadset consists of feu-duties; and the Act 1681 gives the right of voting only to *proper wadsets of lands*. The difference between proper and improper wadsets is, that the person in right of a proper wadset takes the whole profits to his own use, without any kind of account. In other words, the use of the land for the use of the money. During the subsistence of the wadset, he is absolute owner until the redemption agreed on take place, upon repayment of the money. Whereas the improper wadsetter receives indeed the profits, but is accountable for the surplus beyond what pays his interest; and such surplus goes *pro tanto*, in extinction of principal. His estate, therefore, is not absolute or certain, and the act 1681 confines the right of voting to a proper wadsetter, which the respondent is not, upon the principle that such wadsetter is an owner, and infeft in a fixed durable estate.

Pleaded for the Respondent:—The respondent's title is a proper wadset, as he has taken the rents of lands for the use of the money, which is the proper characteristic of a proper wadset. He has no demand of interest from the debtor, and he is liable to every hazard of diminution of the fruits by tenants, war, and troubles which, according to the Act 1661, constitute a proper wadset. What constitutes an improper wadset is where the creditor has his interest secured to him by his debtor, whatever should befall of the rents. The creditor may agree to pay public burdens—may reserve to himself any particular casualty, yet those stipulations do not alter the essential nature of the improper wadset, and convert

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it into a proper one; nor does it make any difference that the wadset is part over feu-duties, and not entirely of lands.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellant, *A. Hume Campbell, Al. Forrester.*

For the Respondent, *Wm. Grant, W. Murray.*

HIS MAJESTY'S ADVOCATE, - - - *Appellant.*
 WILLIAM URQUHART of Meldrum, Esq., *Respondent.*

House of Lords, *6th February, 1755.*

DECREE OF SALE.—PATRONAGE.—TESTING CLAUSE.—SASINE.

—1st. A decree of sale does not cut off the right of or exclude parties not called in the ranking and sale; and the Act 1695 does not protect a purchaser in such a case. 2d. A contract as to patronage sustained, though the witnesses' designations to the subscription of one of the contracting parties were not inserted in the body of the deed. 3d. Found no objection to a sasine that the notary's docquet did not mention the particular symbols used in passing infestment, or bear the notary's motto affixed to his signature, the sasine being eighty years old, and possession having followed upon it.

- No. 108. THE respondent believing that under the titles of his estate of Cromarty, purchased at a judicial sale, he had good right to the patronage of the church of Cromarty, on the occasion of a vacancy occurring presented a minister to the vacant benefice. But his Majesty's Advocate for his Majesty's interest having disputed this claim, and stated the Crown's pre-

ferable right before the Presbytery, the Presbytery rejected his presentation, whereupon the present action was raised by the respondent. His summons set forth that the Crown had in 1588 given the patronage by grant to William Keith of Delny, who disposed it to Sir Robert Innes, from whom the estate of Delny and patronage of the parish of Cromarty were purchased by Sir George Mackenzie in 1656; and from him and his creditors these were purchased by the respondent conform to decree of sale, which decree he contended must be held to exclude the Crown's right. In defence it was stated, 1st, That the Crown had not been called to or made a party to the ranking and sale, and therefore was not bound by it. 2d, That the Crown came in place of the Bishop of Ross, who was patron before the abolition of episcopacy; and it was admitted as stated above, that the Crown had, when patronage fell into its hands at the Reformation, executed the grant in favour of Keith in 1588, but patronage being again restored in 1606, the Bishop of Ross, to whom it originally belonged before the Reformation, having claimed the same, an agreement was come to in 1636 with Sir Robert Innes their possessor, to which the Crown and the Bishop were parties, by which the Bishop was to have back the patronage of the church. Accordingly the Bishop received back his patronage of the parish of Cromarty, and in his person it stood vested at the final abolition of episcopacy in 1641, when it again reverted to the Crown. In answer it was maintained by the respondent that the Crown's title was objectionable in many respects. In particular, the agreement founded on, whereby the Bishop, after the restoration, got back the patronage, was null and void, in consequence of the wit-

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nesses to Sir Robert Innes' subscription not being designed in the testing clause.

The testing clause ran thus:—"In witness where-
 " of all the said three parties have subscribed thir
 " presents. Whilks are written by John Dick, servi-
 " tor to John Gilmour, Writer to his Majesty's signet,
 " day, place, and year of God above written: Before
 " these witnesses, ——— and John Earl of
 " Traquhair, High Treasurer of Scotland, witnesses to
 " the signature of his Majesty, the said sixteenth day
 " of May. And before Walter Hay, Advocate, and
 " Peter Bayne, witnesses to the subscription of the said
 " John, Bishop of Ross. And before John Innes, Mr
 " William Innes, and Alexander Livingstone, witnes-
 " ses to the subscription of the said Robert Innes of
 " that ilk, At the day of the year of
 " God 1636."*

The witnesses to Sir Robert Innes' signature signed thus:—

JOHN INNES, Witness to Sir Robert Innes of that ilk his subscription.

MR WILLIAM INNES, Witness to the samen.

ALEXANDER LIVINGSTONE, Witness to the samen.

The contract was signed by nine officers of state for his Majesty, and correctly signed and tested by the Bishop of Ross. The objection applied only to the other contracting party, Sir Robert Innes.

It was also objected that the instrument of sasine which followed on this contract in favour of the Bishop of Ross was null and void, in respect the particular symbols used in infefting in a patronage, namely, the psalm-book and keys of the church, were not used on this occasion, and also that the sasine

* Where the blanks appear, the writing, from age, was worn away.

wanted the seal, and motto of the notary who passed it.

The Court after full argument “sustained the objection, that the witnesses’ designations are not insert in the body of the contract 1636; but find that the same may be supplied by condescending on the designations, and instructing the same. And find that Sir Robert Innes could not be completely denuded of the patronage in question in favour of the Bishop, without sasine following in the person of the Bishop. And repelled the objection to the Bishop of Ross’s sasine, that the same does not mention the special symbols delivered at taking infeftment, in respect that the sasine bears, that the usual solemnities in the like case were duly observed. As also repelled the objection, that the record of the said sasine does not contain the sign and mark used by the notary who attests it. And they also repelled the objection, that the precept under the quarter seal on which the sasine proceeded, is not produced: And lastly, they repelled the allegiance founded on the Act of Parliament 1695; and find that the right of the Crown is not barred by the decret of sale.”

On reclaiming petition, the Lords “sustained the objection that the witnesses’ designations are not insert in the body of the extract 1636,” &c.

Against these interlocutors, in so far as they sustain the objection that the witnesses’ designations are not insert in the body of the contract 1636, the present appeal was brought by his Majesty’s Advocate, and a cross appeal by the respondent as to the objections repelled stated to the sasine, and also to those founded on the decree of sale.

*Pleaded for the Appellant:—*1. At the time the con-

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tract in question was executed, neither the common law nor the statute law of Scotland, required that the designations of the witnesses should be inserted in the body of the deed. The Act of Parliament 1579 does not apply, because that act provides for the special case of parties executing deeds who cannot write, and orders two notaries before four witnesses to sign them for him with the view of preventing fraud: That the real meaning and intent of that act was thus special in its nature, no one doubts. When a recent deed lies under suspicious circumstances of having been forged, or fraudulently obtained, the court, in their discretion, might order the witnesses to be designed; but in the case of this deed there can be no suspicion, because the high rank of the parties, and the immediate publication of it in so many records, exclude all idea of fraud. The length of time, too, makes a condescendence of their designations impossible. Looking, therefore, to the statute 1579, and seeing that it requires only the designation of the witnesses to deeds subscribed by notaries, where the parties themselves cannot write, and also seeing that the present law of requiring the designation of the witnesses was not introduced until 1681, long after the date of this contract, the objection to it on that ground ought to be repelled. 2. In regard to the cross appeal, there are no fixed symbols of infestments for patronages, and it is sufficient that the Bishop of Ross' sasine bears, that the usual solemnities in like cases were observed, which necessarily supposes that the correct symbols were used. 3. And as to the notary's attestation, it is sufficient that it contains at full length the notary's subscription and attestation; and it was no objection to the sasine, that his motto and cypher are not

copied into the record, as there is no law requiring such to be done, and no invariable practice on the subject. 4. As to the decree of sale, the Act 1695 has nothing to do in the present case. That act secures to purchasers of bankrupt estates every right which the bankrupt or his creditors had; but the appellant is not a creditor. The act never meant to protect such sales against the right of third parties, not called as parties to the sale, and whose estates had been erroneously disposed by the decree of sale. The present patronage belonged to his Majesty, and not to Sir George Mackenzie, the bankrupt, at the date of the decret of sale, and so could not be carried off by it.

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Pleaded for the Respondent:—1st, The law of Scotland requires to the execution of all deeds that the names and designations of the witnesses be inserted in the body of the deed. The Act 1579, although apparently applying to those cases only where writs are subscribed by the aid of notaries, has been construed by several decisions, to refer to all other deeds; but, at same time, contrary to the spirit and intendment of that act, a rule had crept into practice, of allowing the designations to be supplied by condescendence. The latter rule was expressly abolished by the statute 1681, which also enacted that in all deeds of whatever nature, whether subscribed by the parties themselves, or for them, by the aid of notaries, that the designations of the witnesses must be insert in the deed, consequently that the contract in question is null and void, without the designations of the witnesses to one of the subscribing parties thereto. *2d,* As to the respondent's cross appeal, it is evident in law, that the symbols in giving sasine are essential. Here none are mentioned, and

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the usual symbols of patronage, being a psalm-book or the keys of the church, these not having been used, the sasine is thereby rendered null. 3d, Further, according to the law of Scotland every notary is bound, in passing infestment, to use a certain motto or sign added to his subscription, the object being thereby to impose a check against forgery and fraud; and in this case the notary not having used such, the same is null and void. 4th, If the purchasers at judicial sales were to have their purchases evicted from them, on latent deeds of the bankrupt, or those from whom he derives right, it would entirely destroy the faith and credit due to such sales, which are esteemed the best security in Scotland. By the words of the Act 1695 the purchaser is for ever exonerated, and the lands purchased disburdened of the debts and deeds of the predecessor of the bankrupt, from whom he derives right. According to the plain intention of the Act, they ought to be disburdened of the debts and deeds of the author, or first donor, from whom the bankrupt derives right; for the mischief to the purchaser is the same, whether the estate be evicted by the deeds of the one or the other. Besides, he ought to have appeared in the sale, by the forms of which all parties concerned are apprised; and he is not *in bona fide* to say that he was not a party to the ranking and sale.

After hearing counsel, it was

Declared that the want of the designation of the witnesses to the subscription of Sir Robert Innes in the contract of 1636 is suppliable, and is sufficiently supplied, in the present case, by the subscription of the other parties appearing to have signed that contract, the length of time, and other adminicles, proved in the cause, without any conde-

scendence. And it is therefore ordered and adjudged that the said interlocutor of the 28th July 1753, and the interlocutor of 18th December following, adhering thereto, in so far as they sustain the objection, That the witnesses' designations are not inserted in the body of the contract of 1636, and require any condescendence, be, and the same are hereby, reversed; and that the said objection of the want of designation of the said witnesses be repelled. And it is further ordered and adjudged that the said cross appeal be, and is hereby, dismissed this House, and so much of the said interlocutor of the 28th of July 1753 as is therein complained of be, and the same is hereby, affirmed."

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For the Appellant, *W. Murray, R. Dundas.*

For the Respondent, *A. Hume Campbell, C. Yorke.*

Note.—In the Court of Session the judges said, That of necessity the witnesses must be designed. Therefore lapse of time won't free from nullity. In regard to non-use of the proper symbols and the notary's motto, they repelled these objections, the sasine being eighty years old, possession had upon it, and the practice as to these solemnities at the time not being uniform.—M.S. on Sess. Papers.

Lord Kames observes, Dec. p. 80:—"It appears to me a very clear point, that, before the Act 1681, it was not a necessary solemnity in an obligation subscribed by the granter, that the witnesses should be designed, or so much as be mentioned. By the common law, sealing was sufficient. The Act 1540 made the subscription of the party essential, without any other form than that the subscription should be in presence of witnesses. It was not even made necessary that the witnesses should be named. The Act 1579 relates only to deeds subscribed by notaries in place of the party. This is an extraordinary power, and the legislature justly thought that it required extraordinary checks. A deed subscribed by the party himself is in a very different case. Originally sealing was thought sufficient; the subscription of the party was made necessary no earlier than 1540; and in the

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1579 the subscription of the party was in all appearance reckoned of itself a sufficient security against forgery, without any other check. Therefore neither the words, nor spirit of this statute, comprehend those who are witnesses to the subscription of the party himself."

In this case the general question of the effect of a decree of sale obtained by a purchaser, at a judicial sale, against the right of a person not called in the sale, was debated, and decided to be ineffectual as a bar to that person's right.

This part of the case is founded on by Erskine, B. II. tit. 12, § 63.—Adopted by Professor Bell, 2 *Comm.* p. 321, and recognised in the case of Middlemore, 5th March 1811, *Fac. Coll.*

[M. 7873.]

JAMES MURRAY, Esq., Receiver-Ge- neral of the Customs in Scotland, and his MAJESTY'S ADVOCATE,	} <i>Appellants.</i>
ANDREW THOMSON and OTHERS, Cre- ditors and Adjudgers, - - -	
	} <i>Respondents.</i>

House of Lords, 24th February 1755.

CROWN'S PREROGATIVE.—Crown has no preference for revenue debt over real estate—its preference only extends over moveable estate in Scotland.

No. 109. JOHN BURNET was owing His Majesty's Customs L.2616, being the duties on tobacco imported by him: A writ of extent was issued and certain sums recovered against his personal estate, by which the debt was reduced to L.1578, 13s. 5d. sterling. For this debt the Crown adjudged his real estate, and was infeft; and within a year and day of that adjudication, the respondents, also creditors of Burnet, adjudged in like manner his real estate. The question was, whether the Crown had a preferable right over the real estate to the other adjudging creditors.

The adjudging creditors, subsequent to that of the Crown, maintained, that the Crown had no prefer-

ence by law over other creditors in real estate, but only over the moveable estate; and that by virtue of the Act 1661, all appraisings within a year and day of the first effectual apprising, were entitled to rank *pari passu*. To which it was answered, that by the prerogative of the Crown, as established by law, the King's interest was preferable to all other creditors.

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The Lords, on report of the Lord Ordinary of this date, pronounced this interlocutor:—"Find that before the union of the kingdoms of England and Scotland, the king, by the laws of Scotland, was entitled to no preference for revenue debts upon the real land estates of his subjects, but according to his diligence; and find, that by the Act 6 Anne, the laws of Scotland, as to real estate, are saved, and declared to hold place and be observed; and therefore, find his Majesty preferable only *pari passu* with the adjudgers within year and day of his adjudication, and prefer him and them *pari passu* accordingly."

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The Crown reclaimed, but the Court adhered.

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Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—By the law of Scotland the king is always preferable for his debt over other creditors, especially in a revenue debt falling under the customs and excise. This preference is not confined to any particular estate, but extends over all. Nor is the Crown's preference taken away by the 6 Anne, which provides—"That no debt or duty from any of the debtors or accountants to the Crown in Scotland, shall affect or subject any real estate in Scotland of any such debtors or accountant, to the payment or satisfaction of any such debt or duty, further or otherwise, or

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“ in any other manner and form, than such real estate may, or ought to be subject, or liable thereto, “ by the law of Scotland.” This clause does not cut off the Crown’s preference for revenue debt over real estate in Scotland. It provides that the king’s prerogative is to extend no further than it may or ought to be extended by the law of Scotland; but as the law of Scotland cannot limit the king’s prerogative, his preference attaches on real estate as well as personal.

Pleaded for the Respondent:—By the Act 1661, all creditors obtaining decrees of adjudication within a year and day of the first effectual one, are entitled to be ranked *pari passu*. This is a statutory regulation, and the Articles of Union, and the Act 6 Anne establishing the Court of Exchequer in Scotland, made no alteration of this law, or any exception to it in favour of revenue debts due to the Crown. On the contrary, in so far as real estate was concerned, and upon a sound construction of these acts, there is the strongest evidence for supposing that real estate was excepted. The Crown has a preference over the moveable estate before all other creditors, but can have none except through force of diligence on the real estate.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *W. Murray, Ro. Dundas, Rich. Lloyd.*

For Respondents, *A. Hume Campbell, S. Fraser.*

Elchies’ Notes, p. 16. “ We all gave our opinions separatim on this important question, and unanimously found that Murray could only be preferred *pari passu*, and agreed that a contrary law would make a terrible convulsion in our land rights.”

[M. 2661.]

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EDWARD HILL and CATHERINE CART-
WRIGHT, his wife; Mrs MARY BUR-
ROUGHS, Widow of Colonel Bur-
roughs, and FRANCES CARTWRIGHT,
&c., residing in England, and J.
HAMILTON, W.S., their Attorney, } *Appellants.*

Sir ARCHIBALD GRANT, - - - *Respondent.*

House of Lords, 18th March, 1755.

COMPENSATION. — DISCHARGE. — FOREIGN ADMINISTRATOR. —

Compensation was pleaded against an heritable bond. Held this plea was barred by mutual general discharges granted of even date with the bond; and not competent to be pleaded against the party to whom the bond was assigned, although assigned in security. Also held that an English executrix is not liable to be called to account in the Courts in Scotland.

SIR ARCHIBALD GRANT being indebted to Lieut.- No. 110.
Colonel Burroughs in the sum of L.3810, granted an heritable bond for the sum of L.2000, payable five years thereafter. This bond was granted as the result of an adjustment between them of mutual claims against each other, and of even date therewith a discharge was granted, referring to the debt of L.3810, and to this bond as having been granted in full satisfaction of this balance, and both parties mutually discharged each other. This bond for L.2000 was assigned by Colonel Burroughs to his father-in-law, Cartwright, who died, leaving the appellants, his daughters, Catherine, Mary (Colonel Burroughs' wife), and Frances, his only children and heirs.

Colonel Burroughs, the cedent, died in October 1742.

The three daughters raised action for payment

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of this bond. In defence, it was pleaded, That the bond was not assigned by Colonel Burroughs to Cartwright, his father-in-law, for an onerous cause, but merely to enable him to raise a fund of credit, or at most was merely in security of a sum provided to his daughter, the Colonel's wife, by marriage-contract with her. That this provision, if due to them as a debt, was partly satisfied by Cartwright's execution upon a judgment obtained, and partly by Mrs Burroughs' intromissions with the Colonel's effects, for which she was liable to account. Yet, assuming the assignation to be onerous, still the debt was extinguished by compensation by debts which the respondent had paid for Colonel Burroughs, the cedent. Being concerned in several contracts and leases of mines and woods along with the Colonel, the respondent had made considerable advances for him beyond his proportion. To this defence it was answered, That the assignment of the bond by Colonel Burroughs to Cartwright was purely onerous, being in implement of his wife's marriage-contract provisions: That no part of the debt was paid: That L.1607, 12s. 9d. had been recovered by execution on Burroughs' effects, but this had been applied to the discharge of his other debts. And as to the account of Burroughs' effects come into the appellant Mary's hands, she maintained that she was not liable to account for them in Scotland, she being an English executrix under the English will of her husband, proved in the Prerogative Court of Canterbury; and as to the plea of compensation, there were no grounds even for pleading it against the cedent, far less against the assignee, because the whole of the counter claims referred to were included in the mutual discharges granted of even date with the bond.

The Court of this date, *inter alia*, "found that
 " the pursuer, Mrs Burroughs, who adminis-
 " trate the effects of the deceased Colonel Bur-
 " roughs, her husband, in England, is not bound to
 " account here for her intromissions in virtue of
 " that administration."

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On reclaiming petition on the whole points, the
 Lords afterwards "found it competent to the said de-
 " fender Sir Archibald Grant, notwithstanding the
 " mutual general discharge, dated 26th September
 " 1733, of all demands preceding that date, to plead
 " retention on account of debts arising from copart-
 " neries, though contracted prior to the said 26th of
 " September 1733. 2d, Found that there is suffi-
 " cient evidence that the bond pursued on was con-
 " veyed to the deceased Mr Henry Cartwright for
 " security and in implement of the marriage articles,
 " settling the sum of L.3000 sterling upon Mr Bur-
 " roughs for life, and after his death to Mrs Burroughs
 " for life, and after both their deaths to the children of
 " the marriage; and failing issue of the marriage, to
 " the survivor, their executors, and administrators.
 " 3d, Found that there is no sufficient evidence that
 " the sum covenanted by the marriage articles was
 " satisfied, in whole or in part, by Cartwright's intro-
 " missions with Burroughs' effects, further than to
 " the extent of L.1040 sterling applied to the pur-
 " chase of L.1000 capital South-Sea stock. 4th, And
 " found it competent to the defendant to plead com-
 " pensation against the bond pursued on to the extent
 " of the *annual rents* during Mr Burroughs' life. 5th,
 " But found it not competent to the defender to
 " plead retention on account of Mrs Burroughs be-
 " ing administrator of her husband's effects in Eng-
 " land, and of the defender's counter-action against

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“ her before this Court for recovery or allowance of
 “ his claims against her deceased husband; and re-
 “ mitted to the Lord Ordinary to proceed accord-
 “ ingly.”

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Another reclaiming petition was presented but refused.

Against the interlocutor of 24th July 1752, so far as it finds compensation pleadable as regards the annual rent that fell due during Mr Burroughs' life, and also against the interlocutor of 11th July 1754, except that part of the same which found the respondent not entitled to plead compensation on account of Mrs Burroughs' intromissions with Colonel Burroughs' effects in England, an appeal was brought. The respondent also presented a cross-appeal against such parts of the interlocutor as were against him, and in particular the interlocutor of 24th July 1752, and against 2d, 3d, and 5th articles of the interlocutor of 11th July 1754.

Pleaded for the Appellants:—The mutual general discharges executed and signed by the parties, of even date with the bond in question, totally bars all claims of compensation or retention, and proves that all such claims existing prior to that date, were thereby discharged and extinguished. This discharge expressly releases “ all demands ” against each other preceding that date, and it is now incompetent for the respondent to bring forward these old claims against the bond now sued for. Besides, that bond was assigned by Burroughs to Cartwright for a valuable consideration; namely, the securing performance of an obligation contained in an ante-nuptial contract of marriage, and having no notice at this time of any counter claim affecting the bond assigned, as existing prior to the assignation, the same is de-

mandable by the appellants purified of all such pretended claims of retention against Burroughs the cedent, both as to principal as well as to annual rent falling due during Burroughs' life. Nor does the cause for which the assignation was granted, as pleaded in the cross-appeal, affect the validity thereof, or the rights of parties, or the question whether retention is competent or not, because it is clearly established that *that* cause was an onerous one; namely, the securing to his wife the marriage-contract provision, which he had previously become bound to secure. And in regard to the cross-appeal, it is quite clear in law, that an English administrator cannot be called to account for intromissions in the Scotch Courts. They have their suit against her in England but not here.

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Pleaded for the Respondent:—That the mutual discharge, granted of even date with the bond, did not comprehend, and was not intended to cover, the transactions between them as joint partners in the mines. These were not then in consideration, and not then even known to the parties, as the debts due by the concern were not ascertained. To make the discharge therefore extend in these circumstances to the mining concern, would be a stretch of construction beyond what law permits. While in regard to the interest of this bond falling due, and payable during Colonel Burroughs' life, it is quite evident, that it was attachable by his creditors, who could plead retention against it, because the assignation, looking to the nature thereof, could not exclude retention to this extent. But, further, if Colonel Burroughs' effects were intromitted with, it is impossible to say how much of the marriage provision may have otherwise been recovered, so as to

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be imputed *pro tanto* of the claim, and thereby to affect the onerosity of the assignation. And as there can be no doubt Mrs Mary Burroughs is bound to account for the sums come into her hands of her husband's effects, and as action is raised against her for that purpose, she was liable to account for them; and it is no answer to this to say, that an English administrator is not liable to be sued in the Courts of Scotland. As she sues in this Court, so also ought she to be amenable to the jurisdiction to which she resorts.

After hearing counsel, it was

Ordered and adjudged, that so much of the said several interlocutors as is complained of in and by the original appeal be, and the same is hereby, reversed. And it is further ordered and adjudged, that the said cross-appeal be, and is hereby, dismissed this House; and that the several interlocutors, and parts of interlocutors, in and by the said cross-appeal complained of be, and the same are hereby, affirmed.

For Appellants, *W. Murray, Al. Forrester.*

For the Respondent, *Robert Dundas, A. Hume Campbell.*

Note.—In giving judgment, it was observed by the Judges of the Court of Session, on the point of international law:—"That Mrs Burroughs not only could not be properly discharged here, but how could she account here by the law of England? How could she show here what claims were against her in England, or what allowances she was entitled to by the law there; or how could she bring her husband's English creditors to account here?" Upon this point, which was made the subject of the cross-appeal, their judgment was *affirmed* in the House of Lords.—*Vide Ferguson, &c., v. Douglas, Heron & Co., House of Lords, 11th November 1796. Appeal cases.*

Sir JAMES COCKBURN of Langton, - *Appellant.*
 Sir JAMES COCKBURN of that ilk, - *Respondent.*

1755.

 COCKBURN
 v.
 COCKBURN.

House of Lords, 21st March 1755.

PUBLIC OFFICE.—Office of Chief Usher to the King held to be adjudgable by the creditors of the party who held the appointment, the same being hereditary and patrimonial in its nature.

By charter of King Robert II. the appellant obtained a grant of the lands of Langton. Various other charters followed, and one in 1509 conferred on his family the hereditary office of Chief Usher to the King. No. 111.

In 1609 the lands and barony of Langton and office of King's Usher were conveyed to Sir William Cockburn and the heirs male of his body, &c. The family getting afterwards into debt, Sir James Cockburn became liable for several of those debts, in consideration of which the office was disposed to him on account of those engagements. At the same time other creditors adjudged both the estate of Langton and the office of Chief Usher.

A ranking and sale was thereafter brought of the estate, including the office, when for his interest Sir James Cockburn appeared as disponent, and opposed the sale in so far as regards the office of King's Usher. The question was whether the office of Chief Usher was adjudgable. Of this date, "on report of Lord Arniston, the Lords find that the office in question is adjudgable, and remit to the Lord Ordinary accordingly." Dec. 14, 1744.

On reclaiming petition the Lords adhered to their former interlocutor; and of this date the Lord Ordinary decerned accordingly. July 23, 1747. November 21.

1755.

COCKBURN

v.

COCKBURN.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant:—Grants from the Crown of offices and dignities attach to the person, and continue purely beneficiary, and were not intended to be the subject of commerce. That by the principles of the feudal law, which still continued in force, these could not be alienated by the grantee without the consent of the Crown. It is also the law of Scotland that peerages and offices are not *in commercio*, but adhere to the person favoured, and are of the nature of a series of life-rents to the grantee and his descendants.

Pleaded by the Respondent:—By the law of Scotland offices heritable in their nature have been considered as feudal and patrimonial estate; and as such might be sold, alienated, have been transferred in dowry, let on lease, and are equally adjudgable at the instance of *bona fide* creditors. In a variety of instances they have been so adjudged from the proprietors by their creditors for payment of their debts, and have upon these titles been held and enjoyed by the purchasers. It is in every sense a strictly feudal and patrimonial estate conferred on the grantee and his heirs *in fee* and *heritage*; and it not uncommonly has been granted to heirs and assigns. All these authorities show that the office is alienable in its nature, and so adjudgable.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the said interlocutors therein complained of be, and the same are hereby, affirmed.

For Appellant, *W. Murray, A. Hume Campbell.*

For Respondent, *C. Yorke, Andrew Pringle.*

[M. 9819.]

MRS ISABELLA GRANT, relict of James }
 Sutherland, - - - } *Appellant.*
 DAVID SUTHERLAND, heir-apparent of }
 James Sutherland of Pronsie, } *Respondent.*

1755.

 GRANT
 v.
 SUTHERLAND.

House of Lords, 15th April 1755.

HEREDITATE JACENTE—STATUTE 1695—PASSIVE TITLE.—

Held that the statute 1695 as to the passive titles, is a correctory statute, and must be strictly interpreted, and did not apply to the case of an heir who possessed an estate in which his predecessor died unentered, and to which he declined to make up titles.

JAMES SUTHERLAND, brother to the respondent, No. 112. died, seized and infeft in the estate of Pronsie, leaving a son, James Sutherland, to succeed him in the estate. The latter married the appellant, and on his marriage with her, he entered into marriage articles by which he became bound heritably to infeft her, in case she should survive him, in a yearly annuity of 800 merks Scots (L.44, 8s. 10d.); and further, to provide her in a convenient jointure-house, or pay her L.50 Scots yearly (L.4, 3s. 4d.) He afterwards died without ever having been infeft, leaving issue of this marriage, one son, and a daughter. On the son's death in 1743, the estate, which stood limited to *heirs-male*, devolved on the respondent, who, in consequence of the annuities and other debts which affected it, and which exceeded its real value, *did not make up titles* to his brother, for fear of involving himself in the payment of these debts. Notwithstanding this, the appellant raised the present

1755.
GRANT
v.
SUTHERLAND. action against him for payment of her annuity, secured by marriage-contract. In making this claim, she founded on the two clauses of the Act 1695; *first*, That if any person shall serve, or by adjudication on his bond hath succeeded, "not to his immediate predecessor, but to one remoter, as passing by his father to his goodsire, or the like, then, and in that case, he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in possession of the lands and estate to which he is served for the space of three years." And *second*, That "if any apparent heir for hereafter shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate, or any part thereof, or shall purchase by himself, or any other for his behoof any right thereto, his foresaid possession, or purchase, shall be reputed a behaviour as heir." It was alleged by the appellant under the first clause, that had the respondent *been served*, or possessed the estate by an adjudication on his bond, he would have been liable under that clause; but as he had entered into possession without those titles, his possession must, under the second clause, be considered as reputed behaviour as heir, and so to subject him in payment of the debts of his predecessor.

Dec. 12,
1754.

The Court, on the report of the Lord Ordinary, found, of this date, "That the said David Sutherland (respondent) of Pronsie is not liable to pay to the pursuer, Mrs Isabella Grant, widow of James Sutherland late of Pronsie, her annuity in her contract of marriage with the said James Sutherland, and therefore assoilzie and decern accordingly."

Against this interlocutor the present appeal was brought to the House of Lords.

1755.

GRANT

v.

SUTHERLAND.

Pleaded for the Appellant:—That the estate remains in *hereditate jacente* of the person who died last vested and seized, until the title is established in the person of the heir by infestment proceeding upon his service. While unentered, the person next entitled to succeed, is called apparent heir, and when entered, he is in the construction of law one and same with the defunct, and is liable universally for his debts. *Pro gestio herede* has the same effect, because the person who so manages as heir, is also liable universally, as if he had entered, for the debts of his predecessor. The Act of Parliament 1695 was intended to prevent the frauds of apparent heirs, so as to secure the rights and interests of creditors, and that their remedy might be more effectual and secure against the party taking the estate. By the first clause the respondent would have been liable had he served heir, or adjudged on his bond; but under the second clause he is equally liable, because he has incurred a passive title by behaviour as heir. He possesses a part of the estate as apparent heir, and yet avoids to complete his title. This ought not to be allowed, as a fraudulent attempt to evade the claims of just creditors, and also because it is neither agreeable to law nor equity, that a defect in title should screen one in possession of the estate. Against this the Act 1695 was expressly enacted. The word "*predecessor*," in both clauses of the act, was to be construed as descriptive of immediate predecessor or first apparent heir, to whose debts the second apparent heir must be liable; and therefore, while the respondent maintains that he will neither enter

1755.
GRANT
v.
SUTHERLAND. nor renounce, he must still be liable under the statutes.

Pleaded for the Respondent:—The whole argument here assumes that the respondent has taken possession of his predecessor's estate, and therefore, having done so, he is liable under the statute and the passive titles for his predecessor's debts; but this presumed act of possession is a mistake; the fact as to that being, that the appellant herself is and has been in the actual possession of the lands, and realising out of these the sum of L.31 per annum towards payment of her annuity, and had besides retained of her husband's personal estate L.670; whereas all the benefit which the respondent could possibly realize, would be, the small sum of L.6 or L.7 per annum, being all that remained of the profits of the estate after paying this annuity. But having in regard to this always expressed his readiness to renounce the succession, and never having attempted to possess the estate, to enter, or to behave as heir in the sense of the statute, he cannot be held liable to the appellant's annuity. Besides, by the law of Scotland, in order to vest a party in an estate, he must complete titles according to established forms, and be infeft and seized, otherwise on his death the estate is in law not considered his property, and cannot be disposed of by his deeds, nor affected by his debts. The appellant's husband died without ever having completed his title to the estate in question, and therefore his creditors have no remedy against his heir, who could never take the estate as representing their debtor, because it never was his property, but remained in *hereditate jacente* of the former predecessor. The first and second clauses of the statute 1695 do

not therefore apply to the circumstances of this case. 1752.
 The first clause subjects an apparent heir to the debts GRANT
 of his predecessor, who has been three years in pos- v.
 session, in case he should make up his titles by ser- SUTHERLAND.
 vice, or by adjudication on his bond; but the respon-
 dent has done neither of these; and the only ques-
 tion is, has he subjected himself to liability under
 the second clause, which refers to behaviour as heir?
 Now, it is clear that this second clause refers *not* to
 the case of an *apparent heir* whose ancestor died *un-*
entered, but to one whose ancestor died having the
 property of an estate vested in him; which was not
 the case here; and the term predecessor must there-
 fore be held to apply only to the latter, and not to
 the former case.

After hearing counsel, it was

*Ordered and adjudged, that the appeal be dismissed,
 and that the said interlocutors therein complained
 of be affirmed.*

For the Appellant, *W. Murray, Andrew Pringle.*

For the Respondent, *Sam. Cox, S. Frazer.*

Note.—This decision overrules the judgment in the House of
 Lords in the previous case of *Grant v. Sutherland*, *vide* *Craigie*
and Stewart, p. 416 and 426, and is now the leading authority,
 together with *Sinclair v. Sinclair*, 8th Jan. 1736 (9810), and
Leith v. Banff, 9th Dec. 1741 (9815).—*Professor More's Stair*
Notes, cccxxxv.

[M. 15404.]

<div style="text-align: center;">1756.</div> <hr style="width: 100%;"/> <div style="text-align: center;">ROSS v. LOCKHART.</div>	Sir ALEXANDER ROSS, formerly } GILMOUR, Bart., - - - } <i>Appellant.</i> Colonel JAMES LOCKHART, assum- } ing the surname of Ross, } <i>Respondent.</i>
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House of Lords, 12th February 1756.

CLAUSE IN ENTAIL.—A devolution clause in an entail, which contemplated the party favored possessing the estate disposed first, and then afterwards succeeding to another estate. Held that the devolution clause was effectual, though the party succeeded to the latter estate first, then afterwards to the estate disposed by the entail.

Ap. 28, 1683. SIR ALEXANDER GILMOUR of Craigmiller, by deed of entail, settled his estate of Craigmiller upon his eldest son, John Gilmour, and the issue male of his body; whom failing, to the issue male lawfully to be procreated of Sir Alexander's own body, with other substitutions, reserving his own liferent. Infertment passed upon a charter obtained under the great seal, whereby Sir Alexander was divested of the fee of the property of his estate of Craigmiller.

Aug. 5, 1727. General Charles Ross of Balnagowan, who was connected with the Craigmiller family and the Great-uncle to the appellant, also executed an entail of his estate of Balnagowan "To myself and the heirs to
 " be procreated of my body, the eldest of my heirs
 " female succeeding without division; whom failing,
 " to Charles Ross, second son to George Master of
 " Ross, who is only son to William Lord Ross, my
 " brother, and the heirs male to be procreated of
 " the said Charles Ross his body; and the heirs
 " male of their bodies; whom failing, to George Ross

“third son to the said Master of Ross.” &c. In-
cluding in the series of substitutes, the second son
and his descendants, also others of the family of
Gilmour, subject to a devolution in case of their suc-
ceeding both to Craigmiller and Balnagowan. Then
follows the clause in General Ross’ entail, upon
which the present question arises:—“It is hereby
“expressly provided and declared, that whensoever
“the said Charles Gilmour, or his heirs abbove men-
“tioned, *succeeding to, and possessing my estate*, shall
“also succeed to the estate now belonging to the said
“Sir Alexander Gilmour, then and from thenceforth,
“the right of my estate in their favours shall cease,
“and be extinct, void, and null, and the same shall
“fall and pertain to the next heir of entail appoint-
“ed to succeed.”

1756.

ROSS
v.

LOCKHART.

It happened that Charles Gilmour succeeded *first*
to the *estate of Craigmiller* by the predecease of his
elder brothers without issue, an event not contem-
plated by General Ross’s entail; and his son (the
appellant) afterwards succeeded to Balnagowan.

He contended that, as the event contemplated by
General Ross’s entail had not taken place; namely,
his father Charles Gilmour *first* “*succeeding and pos-
“sessing my estate*” of Balnagowan, and afterwards
succeeding to the estate of Craigmiller, he was not
bound to denude Balnagowan and entitled to make
up titles to and retain both estates. This was op-
posed by the respondent, who claimed to succeed to
the estate of Balnagowan, in virtue of the clause of
devolution by which the appellant’s right to the
same was rendered null and void by his succession
to the estate of Craigmiller.

The Lords, on a full argument, pronounced this 26th Nov.
interlocutor:—“Find that the said Lieutenant-Colo-^{1755.}

1756.

ROSS
v.

LOCKHART.

“ nel James Lockhart is the person entitled to be
 “ served heir in special to the deceased George Lord
 “ Ross in the lands and estate of Balnagowan in
 “ virtue of the said tailzie, and deterne and declare
 “ accordingly.”

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—The event provided for and supposed to take place by General Ross's entail never did take place; namely, Charles Gilmour first being in possession of the estate of Balnagowan, and afterwards succeeding to the estate of Craigmiller, on which event alone, their right to the estate of Balnagowan was to cease and determine. But the opposite event occurred; namely, the succession first to the estates of Craigmiller; and the maker of the entail not having declared that he was to denude the estate on this latter event which has occurred, the appellant has a right to retain possession of both estates. At all events this is clear, that the entailer left an election to Charles Gilmour, to say whether he would retain the one estate or the other; but this election was only to be exercised in the event contemplated by the entail; namely, of succeeding first to Balnagowan, so that unless he were to succeed to the latter first, and then to Craigmiller, he would be deprived of the election so conferred upon him. This shows the intention of the entailer himself, if intention were to be admitted to aid the construction; but here, in an entail, which must be strictly construed, no evidence of intention can be admitted. It may have been the probable intention of General Ross to enforce the devolution in whatever manner the two estates may become joined in one and the same person; but not having done this

in so many words, this defect in the entail cannot be supplied by construction.

1756.

ROSS

v.

LOCKHART.

Pleaded by the Respondent:—This is merely a question of construction upon a voluntary deed of the nature of a testamentary disposition, wherein the will of the donor must be the rule. General Ross's obvious intent was to keep the estates of Balnagowan and Craigmiller separate, and never to unite them in the same family. He therefore anxiously provides, that if, the possessor of Balnagowan should afterwards succeed to Craigmiller, then and in that case Balnagowan was to cease to belong to him, and was then to devolve on the next heir of entail. The mere fact of the heir succeeding first to Craigmiller, is immaterial, for the condition ought to hold whether he succeeded first to the one or to the other. It is not likely that he would succeed to both at the same moment, and in any view succession to the one must have preceded succession to the other. The appellant's construction of the clause is therefore contrary to the whole scope and evident meaning of the entail, as well as to the words referred to,—that intent being, to preserve the General's family-estate and name separate and distinct, and prevent it from being united with another, in which his name might be sunk.

After hearing counsel, it was

Ordered and adjudged that the said appeal be dismissed, and the interlocutor complained of be, and the same is hereby affirmed.

For Appellant, *William Murray, Robert Dundas.*

For Respondent, *Al. Forrester, Gilbert Elliot.*

1756.

TURNBULL

v.

SCOTT.

TURNBULL'S CREDITORS (Erskine and	}	<i>Appellants.</i>
Others, - - - - -		
COLONEL SCOTT of Comiston, -		<i>Respondent.</i>

House of Lords, 27th February 1756.

NOTOUR BANKRUPTCY—STATUTE 1696.—Held that apprehension by a messenger under a caption, with detention for a whole night, but without being put in jail, and afterwards allowed to go on part payment of the debt, was a sufficient imprisonment under the act, so as to constitute notour bankruptcy.

No. 114. ALEXANDER TURNBULL of Woodstown becoming embarrassed and insolvent in 1738, a real creditor took possession of his estate for a debt of 13,000 merks, and between that date and 1742, some of his creditors had raised horning and caption on their debts, which obliged him in 1740 to retire for a short time to England, in order to avoid imprisonment. In 1742, his debts, including provisions secured to his children, amounted to 63,000 merks, of which 23,000 were heritably secured on the estate, which only yielded L.1000 Scots yearly rent.

31st March,
1st April,
1742.

Sir Alexander Ogilvie, one of his creditors, having raised diligence against him by caption, he was apprehended on 31st March 1742, and detained in custody of the messenger for one night and part of next day (1st April), at his own request, until he could communicate with his friend; whereupon General Scott came forward and paid L.45 of the debt, upon which he was liberated from the messenger without ever having been imprisoned.

Turnbull in the same month (April) obtained a sist

of execution under a suspension, as to the remainder of the debt, which being removed by the Court in June following, the caption was again put into the hands of the messenger, with instructions to apprehend and incarcerate, unless the debt was paid. General Scott again interposed and paid L.593 Scots, of this date.

1758.
TURNBULL
v.
SCOTT.

17th June,
1742.

Having made these advances, General Scott, of same date, took from Turnbull an heritable bond secured over his estate, in security thereof, amounting to 10,000 merks, and was thereupon infest.

A ranking and sale was brought of Turnbull's estate, in which a competition arose among the preferable creditors.

It was objected to General Scott's heritable bond, that it was granted in satisfaction and security of a prior debt by Turnbull, after he had become a notour bankrupt, and so null by the statutes 1621 and 1696, as well as void, as an undue preference given to one creditor over another. In supporting this objection, they referred to the act 1696, which declares, "That if any debtor under diligence by horning and caption at the instance of his creditor, be either imprisoned or retire to the abbey, &c., and be afterwards found, by sentence of the Lords of Session to be insolvent, shall be holden and reputed on these three joint grounds, viz., diligence by horning and caption, and insolvency, joined with one or other of the said alternatives of imprisonment, or retiring, or flying, or absconding, or forcibly defending, to be a notour bankrupt." The act then proceeds to declare that all voluntary or other deeds granted by such a person shall be void and null.

General Scott's bond being granted on 17th June 1742, the question was, whether at or before this

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TURNBULL
v.
SCOTT.

date Turnbull was notour bankrupt; and whether there was imprisonment, retiring, and absconding in the sense of the act, so as to constitute notour bankruptcy.

Novem. 22,
 1754.

The Lords pronounced this interlocutor:—" Having advised the prepared state, repel the objections made to the heritable bond of corroboration, and prefer Colonel Scott, to the personal creditors of Alexander Turnbull of Woodstown." And on reclaiming petition the Court adhered.

February 18,
 1755.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants:—That at the time the heritable bond was granted to General Scott, Turnbull, the granter, was a notour bankrupt in terms of the statute 1696. His insolvency is proved by the documents of debt lodged in this ranking and sale, all which debts were due at that date. It was also proved by the diligence executed—by several captions being out against him—by imprisonment; for although he was not put actually in jail, yet being apprehended and detained in the custody of the messenger for a night and part of next day, this was sufficient imprisonment in law, and in the sense of the statute: Also, by his concealing himself when sought to be apprehended under these captions, and on one occasion retiring to England to avoid execution. So that the whole requisites of the statute, which go to constitute notour bankruptcy, concur to establish that at the time he executed this bond he was in the eye of law a notour bankrupt. But the granting of this bond was also objectionable under the act 1621, c. 18, which act not only annuls deeds granted by persons in insolvent circumstances to the prejudice of prior creditors, but also all deeds

granted by them to any conjunct or confident person. The debtor here was insolvent, and in these circumstances he grants the bond in question to a person who is his own uncle, thereby securing to him a preference over every other creditor.

Pleaded by the Respondent:—The very notion and term bankruptcy and bankrupt, are statutory and unknown to the common law either of England or Scotland; there can, therefore, be no equitable but a legal bankruptcy, and none is a bankrupt but he who comes under the description of the statute. No deed therefore is affectable, unless the debtor who granted it was, at the time of granting the security, within the description of notour bankrupt described by the act. In the present case the debtor was neither insolvent at the time the security was granted, nor was he at any time bankrupt, according to the words of the statute. That statute points at notorious bankruptcy, not to any one mere isolated act. Apprehension by the messenger, and detention for one night, and enlarged on payment of the debt next day, is not that commitment into the jail which infers imprisonment under the statute. The law intends by such bankruptcy notoriety, by making the debtor's situation known and public, so as to interpel creditors from dealing with him;—that this is not to be inferred from merely apprehending the debtor by the hands of a messenger, for this in all cases may end in payment of the debt. Nor is it to be inferred from insolvency *per se*; because, though a person may be so circumstanced, yet he may continue to enjoy good credit in business, and may retrieve his circumstances. The alternatives of imprisonment, retiring, flying, absconding, or forcibly defending, are the requisites described by the statute. These

1786.

TURNBULL
v.
SCOTT.

1756.
CATHCART
v.
SHAW. requisites cannot be dispensed with, and equipollents cannot be received.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor complained of be reversed; and it is hereby declared, that, Alexander Turnbull having been arrested and actually in custody of the messenger upon the caption at the suit of Sir Wm. Ogilvie, was imprisoned within the true intent and meaning of the act of Parliament of 1696: And it is therefore ordered that the objections made to the heritable bond of corroboration obtained by General Scott be sustained, and that the respondent Colonel Scott have no preference to the other creditors of the said Alexander Turnbull, by virtue of said bond.

For Appellants, *W. Murray, R. Dundas.*

For Respondent, *Al. Forrester, Gilb. Elliot.*

Note.—Unreported in Court of Session; but the judgment in the House of Lords has been founded on, and is the leading authority upon which all the subsequent cases have been decided:—*M'Adam v. M'Ilwraith*, 23d Nov. 1771, Fac. Col.; *Frazer v. Munro*, 5th July 1774, M. 1109; *M'Meath v. M'Kellar*, 1 March 1791, Bell's Cases, p. 22.

[Mor. 15399.]

Lord CATHCART, &c.,	-	-	<i>Appellants.</i>
JOHN STEWART N. SHAW of Green-	}	-	<i>Respondent.</i>
ock, by his Guardian,			

House of Lords, 19th March 1756.

ENTAIL—POWERS OF FEUING AND LEASING—INTEREST OF DEBT.

—1. Question, whether an heir of entail in possession is bound

to keep down the interest of the debt on the estate during his possession. 2. Where power was reserved in the entail to grant feus and long tacks. Held that the powers exercised in virtue of this reservation did not fall within the fair and rational administration of the estate, and therefore feus of the greater part of the estate, together with leases of the mansion house and grounds, and sale of growing wood, reduced.

1756.

CATHCART

v.

SHAW.

SIR JOHN SHAW of Greenock, then fiar of his No. 115. estate, executed an entail of the estate of Greenock 1700. to himself in liferent, and to his son John Shaw and the heirs male of his body in fee, whom failing, to a series of substitutes.

The entail contained prohibitory, irritant, and resolute clauses, "to alter, innovate, or change the present tailzie and order of succession, nor to sell, alienate, dispone, nor to wadset or burden or do any other fact or deed whereby the same might be evicted, appraised, &c." These clauses were directed against the maker himself; but he reserved power to himself, "and after his death to the said John Shaw his son, and the heirs of tailzie and provision above-specified, to grant feus or long tacks for such spaces as they shall think fit of any part or portion of the lands. And also power to the said John Shaw, or any of the said heirs of tailzie, to contract the sum of 50,000 merks Scots money of debt, and therewith to affect the said lands and estate," for provisions to daughters and younger children.

After Sir John Shaw's death, Sir John his son, in 1718, in virtue of the powers contained in the entail to burden the estate for provisions, granted bonds of provision to his daughter Marion Shaw, afterwards Lady Cathcart, to the extent of 50,000 merks, by three several bonds, one for 30,000 merks, one for

1756.

CATHCART
v.
SHAW.

17,000 merks, and one for 3,000. These were made real burdens on the estate, and bore interest payable from (29th September 1718) their date.

He also feued the lands of Broadstone at a reserved rent of 40s. Scots yearly. A feu was also granted of part of the town of Greenock. These grants were not disputed.

August 3,
1719.

remaining unfeued, Sir John, of this date, feued the same to his daughter Lady Cathcart and her heirs, at a reserved rent of 20s. for every fall of dwelling-house, and 5s. for offices and gardens, with a reserved rent of L.996 Scots per annum. He also, of this date, granted feus of the mansion house and gardens

September 2,
1751.

of Greenock to Lord Cathcart, which Sir John himself had built, enclosed, and laid out, since the date of the tailzie. And of the same date he also feued to him two small pieces of ground lying near the town of Greenock, intended for straightening the south boundary of the town, and for building a new church; and for the whole subjects comprehended under these grants, amounting to twelve acres, he was taken bound to pay a reserved rent or feu-duty.

November 1,
1751.

He also of this date feued to Lord Cathcart the lands of Wester Greenock, Finnart, and others. He like-

November
1751.

wise, about the same time, gave him a lease of part of the estate for the space of nineteen years. And by contract of the same date, he sold him also all the wood growing on the estate, the greatest part of which being natural wood, was ripe for cutting, the remainder had been planted by Sir John since the date of the tailzie.

Action being brought by Lord Cathcart on the death of Sir John (the second), against the respondent as next heir of entail, for principal and bygone

interests of the bond for 50,000 merks; and a counter action of reduction being raised by the respondent to set aside and reduce the feus, leases, and sale of the wood above-mentioned, the questions were, 1st, Whether the heir of entail next succeeding was entitled to relief from the arrears of bygone interest, accumulated during the previous heirs' possession? and, 2d, Whether the several feus, the leases, and the sale of the wood were valid and effectual, and a fair exercise of the powers of administration reserved, or an infringement of the entail?

1756.
CATHCART
v.
SHAW.

The Lords, of this date, "Found the pursuer (re- August 10, 1754.
spondent) is not entitled to any relief against the
"defender (appellant), as heir of line to Sir John
"Shaw, of the annual rents of 30,000 merks con-
"tained in the heritable bond produced, granted by
"Sir John Shaw in implement of the obligation in the
"contract of marriage, to pay that sum to the only
"daughter of the marriage; but found the pursuer
"is entitled to relief against the defender, as heir of
"line aforesaid, of the annual rents of the 20,000
"merks contained in the two bonds produced,
"whereof the one for 17,000 merks, and the other
"for 3000, granted by Sir John Shaw to the de-
"fender's father, in exercise of the faculty contained
"in the entail, and incurred during the life of Sir
"John Shaw; and therefore found the said John
"Stewart Nicholson Shaw, and his said tutor, admi-
"nistrator of law for his interest, liable on the pas-
"sive titles, in payment to Hew Dalrymple and
"other trustees of the late Lord Cathcart, of the said
"principal sum of 50,000 merks, contained in the
"bonds pursued for, and annual rent of 30,000
"merks from 29th March 1718, and annual rent of
"the other 20,000 merks from Sir John Shaw's

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“ death (9th April 1752); and likewise of the sum
 “ of 3000 merks of penalty contained in the bond of
 “ 30,000 merks. Sustain the reason of reduction of
 “ the feu-right of the several farms of the wester
 “ barony of Greenock, dated 1st Nov. 1751, and of
 “ the four feu-rights dated 2d Sept. 1751 of the
 “ mansion-house, office houses, gardens, and court.
 “ And found, none of the planting could be cut by
 “ the defender, in virtue of the contract of sale pro-
 “ duced after the death of Sir John Shaw. And
 “ in respect it was alleged by the pursuer, and not
 “ denied by the defender, that the natural wood sold
 “ by the said contract was not fit for cutting at Sir
 “ John Shaw's death: Therefore sustain the reasons
 “ of reduction of the said contract of sale, and repel
 “ the reasons of reduction of the feu-right of the town
 “ of Greenock, and feu-right of that part of the brae
 “ adjacent to some of the yards on the southside of the
 “ town of Greenock, and piece of flat ground on the top
 “ of the said brae, containing in whole three acres, one
 “ rood, three falls, and eighteen ells, dated Sept.
 “ 1751, and sustain the reasons of reduction of the
 “ tack of several farms and parts of the estate, dated
 “ 30th October 1751, so far as it comprehends the
 “ avenues about the house; but repel the reasons of
 “ reduction thereof, so far as it comprehends any
 “ other subjects.”

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On reclaiming petition, the Lords also sustained
 “ the reasons of reduction of the feu-rights of that
 “ part of the brae adjacent to some of the yards on
 “ the south side of the town of Greenock, and piece
 “ of flat ground on the top of the brae, containing
 “ in whole three acres, one rood, thirty-three falls,
 “ and eighteen ells, and decern: And find the 3000

“ merks of penalty due if incurred; but adhered to
 “ their former interlocutor, and refused the desire
 “ of both said petitions as to the other points.”

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Against these interlocutors Lord Cathcart &c. brought the present appeal to the House of Lords, in so far as concerns the interest on the 20,000 merks' bond: And also in so far as they sustain the reduction of the feu-right dated 1st Nov. 1751, of the several farms of the wester barony of Greenock—of the four feu-rights dated 2d Sept. 1751—of the mansion-house, office-houses, gardens, and court of Greenock, and of the two tacks of the same—of the contract of sale of the woods—of the tack of several farms and parts of the estate, 30th Oct., so far as these comprehend the avenues about the house; and against the interlocutor of 31st Jan., in so far as it reduces the feu-right of that part of the brae adjacent to some of the yards on the south side of the town of Greenock, and the piece of the ground at the top of the brae, feus, sales, and lease; and a cross appeal was brought as regards the interest on the heritable bond for 30,000 merks and penalties thereof.

Pleaded for the Appellants:—Entails generally are to be strictly interpreted, and no limitation is extended by implication. The late Sir John Shaw, absolute fiar of the estate of Greenock, having by gratuitous settlement confined himself to an estate tail, *reserving to himself certain powers and faculties*, the question was, whether he had exceeded the true measure of these powers. In considering which, the powers reserved to him in the entail must, in law, be construed in the most liberal sense, more especially in a question with a gratuitous donee. He had reserved power to burden to the extent of 50,000 merks for provisions, and to charge the estate accord-

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ingly. He had power to feu and to grant long leases, for such space as they shall think fit. 1st, As to the 50,000 merks of provision, and interest, and penalty thereon, no objection is stated against the principal sum, but interest and penalty are demanded; and what the heir of entail now states, is, that an heir of entail in possession is bound to keep down the interest of debts charged upon the estate during his possession, in the same manner as if he had only a liferent interest in the estate, and was bound to transmit it to the next heir of tailzie, in the same good condition that he found it; but this has no foundation in law, and it proceeds upon an erroneous supposition, namely, that an heir of entail is a mere liferenter, whereas he is not so, but an absolute fiar, except in so far as he is restrained by the limitations of the entail. In this character he can cut woods and do many other things implied in a proprietary right; and unless there be a clause compelling the heir in possession to keep down the interest of debt during his possession, he will be under no obligation to do so. 2d, In regard to the granting of the feus in question, it was quite clear that by the powers reserved, he had power to grant those now excepted to. As to the feu of the farms, the reserved power does not confine Sir John to the feuing of mere stances for building tenements, and therefore that it empowered him to feu farms at a fair rent, as the clause "to grant feus or long tacks of any part or portion of the estate," at once indicates. 3d, Then in regard to the feus of the mansion-house, office-houses, and garden, as it is admitted by the respondent, that Sir John had power to grant feus of dwelling houses, yards, and offices, there was no reason for making a distinction of Sir John's own house.

The greatest part of the house had been built since the date of the entail by him, as well as the greater part of the pleasure grounds laid out and planted. 4th, And in regard to the sale of the growing wood, as Sir John's interest therein was unquestionable during his life, there was nothing to prevent him then to sell the wood to a purchaser, nor for the purchaser after his death to be entitled to cut the same in virtue of that sale. 5th, And lastly, As to the feu of the town of Greenock, the power reserved of feuing is unlimited in its nature; and therefore there was no reason in the objection to this feu on the ground stated, namely, that instead of a part, it is of the whole town of Greenock to one person.

Pleaded for the Respondent:—The powers reserved in this entail must be construed with reference to the prohibitory, irritant, and resolute clauses which are binding on the maker of the entail himself, and being so construed, it is obvious the powers exercised in the manner here done go to subvert, and are in fraud of the entail. The whole estate is diverted from the heirs of entail, under the colour of feuing. And leases are granted not only of the lands but also of the mansion-house and pleasure grounds, including a sale of the growing woods, such as obviously pointed at an alteration of the order of succession, and a complete disposal of the *dominium utile* of the estate. These cannot be sustained. 1. The arrears of interest, amounting to L.4722, can form no burden or debt against the next heir of entail succeeding to the estate, because the heir of entail in possession has a mere liferent after paying all annual burdens and the interest of debt, and was bound in law to keep down the interest of the 50,000 merks debt on the estate during his possession. Be-

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sides, by the express terms of the heritable bonds, Sir John Shaw bound himself personally, as well as his heirs of tailzie, to pay the annual interest; and over and above this, made over and assigned a proportional part of the annual rents of the estate in question to Lord Cathcart, as a further security, and in payment thereof half-yearly. If the latter therefore allowed Sir John Shaw to receive and uplift these rents for his own use, for a period of thirty-four years, instead of uplifting them himself, this was a wrong application, for which Lady Cathcart's heir must suffer, and not the heir of entail. 2. Then, as to the feus granted by Sir John, he has far exceeded the powers reserved to him by the entail. To grant feus of nearly the whole estate, inclusive of the mansion-house, offices, and gardens, and a feigned sale even of the growing wood, and all this for mere illusory duties or rents, was very like an entire transference of the estate to Lord Cathcart, in defraud of other heirs of entail. By the reserved power Sir John was only empowered to feu out urban tenements or lands for purposes of building, but had no power to feu the farms of the estate. 3. Neither had he power to feu the mansion-house, garden, and offices. 4. As to the wood, as Sir John Shaw's interest in the estate ceased at his death, he had no right to sell the growing wood, to be cut by a purchaser at some remote period of years after his death; and consequently the trees standing at his death as *pars soli*, descend to the next heir of entail. 5. Nor to feu the whole town of Greenock to one person, instead of feuing a portion merely to several individuals for the purpose of building.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors be af-

firmed, with the following variation; viz., in the first-mentioned interlocutor of the 10th August 1754, after the words (so far as it comprehends the avenue about the house) to insert these words, "and also the power of holding courts and naming Baron Bailies."

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For Appellants, *W. Murray, G. Brown.*

For Respondent, *R. Dundas, C. Yorke.*

Note.—This case was much relied on in the Roxburgh entail (feu cause,) 17th December 1813, *Dow*, vol ii. p. 149. At page 227, Lord Eldon, in giving judgment, after referring to the words of power in the above entail, says,—“The chief question there was as to the feu of the Western Barony; and it was held that it could not be feued, as the nature of the reservation showed that only such parts were to be feued as were fitting for dwelling houses and other buildings, and as it was not probable that the town of Greenock should extend to that length. But it had been said in that House, that if ever the time came when the town of Greenock should extend to the Western Barony, then the heirs of entail might grant feus of it.”

In the Queensberry cases, 17th Nov. 1807, House of Lords, 11th Dec. 1813, 2 *Dow*, p. 90, Lord Alloway said,—“It is said without any express prohibition in the entail, it was found, in the case of Greenock, that the heir of entail could not let the mansion-house, or the ground connected with it, and that this is now settled law. I admit this; and even although it were an anomaly, I should never think of disturbing any point that has been decided either by the understanding of the country, or by the judgments of the Court.”

Lord President Blair, in *Gordon v. Gordon*, January 1811, *Fac. Col.*, says,—“The case of growing trees is a case of difficult. Even there, however, the Court, in the case of Greenock, restricted the heir in possession from destroying *silva cedua*, which was not mature for cutting.”

1757. MAJOR FORBES of Pitrichie, Esq., - *Appellant.*
 FORBES v. ANDREW SKENE of Dyce, and Others, *Respondents.*
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House of Lords, 25th January 1757.

ENTAIL.—HEIR FEMALE.—PASSIVE REPRESENTATION.—1. An entail conceived to heirs male, whom failing, to the entailer's daughters by name, and the *heirs male of their body*. Held that a son of one of these daughters was not an heir female, but an heir male in virtue of the destination. 2. There being no annulling clause in the entail, held that the debts contracted by a previous heir affected the succeeding heir under the passive titles.

No. . THIS case arose out of the succession of Major Forbes to the estate of Pitrichie, as set forth in the case reported p. 570.

The entailer's son Sir Charles, after his father's death, ratified the entail, and resigning on the procuratory therein, obtained a charter, but died without issue and without being infeft, whereupon the estate descended to Mrs Jean Maitland.

During the few years Sir Charles possessed, he contracted debts amounting to 30,000 merks, (L.1666.) Jean Maitland also contracted debt to the amount of 20,000 merks, (L.1111.) When her son Charles Maitland, advocate, succeeded, the estate was further burdened with L.2000 sterling. Actions were raised by the respondents, his creditors, against the appellant, as representing Charles Maitland. In defence, the appellant maintained, That Charles Maitland was an heir female, and as heirs female are, by the express provisions of the entail, laid under an absolute prohibition "to wadset" and impignorate the aforesaid lands, or any part

" thereof, or to burden or affect the same with any sum of money above the sum of 50,000 merks," and if the estate became burdened by the previous heir with this sum, then they were strictly prohibited from burdening it with any more, under a contravention and irritancy of their right; and as the entail was his sole title to the estate, and the estate already burdened to the full extent, *his* personal creditors could have no right to attach the same, nor to come against the appellant personally for the debt.

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Answered:—By the peculiar conception of the destination clause, the appellant was an heir male and not an heir female. This is apparent from the clause itself:—"To Charles Maitland, his only son in fee, and his heirs male of his body; which failing, to his younger brothers, and the heirs male of their bodies respectively; which failing, to the heirs female of the said Charles Maitland's body; which failing, to Jean Maitland, his eldest daughter, and the heirs male to be procreated of her body; which failing, to Mary Maitland his second daughter, and the heirs male of her body," &c. He was therefore not bound by the above clause directed against heirs female. He might contract debt, and omit inserting the prohibitive and irritant clauses in the title which he made up to his mother.

Of this date the Lord Ordinary found the appellant "liable to make payment to the pursuers of the sums libelled." And on reclaiming petition the Court, of this date, adhered, with this explanation:—*1st*, That Charles Maitland was not an heir female in the sense of the tailzie made by Sir Charles, his grandfather, in 1700. *2d*, That as there is no annulling clause in the said entail, the same can-

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“ not have any effect against the pursuers’ debts.
 “ And, 3d, That the entail can have no effect as to
 “ the lands of Pitrichie, and others to which Mr
 “ Charles made up titles as heir to his mother, with-
 “ out engrossing the prohibitive and irritant clauses
 “ in his retour and infeftment.”

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant:—*That Charles Maitland had no power to charge the estate with any debt, being bound by the prohibitive, irritant, and resolute clauses therein, as an heir female under the destination of the entail—he being the son of an heir female, (Jean Maitland.) And his mother having exercised the power reserved to burden to the full extent allowed by the entail, he could not burden it with any sum beyond the sum mentioned. The debts therefore of Charles Maitland, advocate, cannot affect the present heir in possession. Even supposing it otherwise, these debts of his being merely personal, and never having been created a burden on the estate, could not affect the same; just as it was equally clear that, if he had done any act or deed to make them a real burden, they would have in like manner been ineffectual. Nor is the question in any degree altered by Charles Maitland making up his titles as heir to his mother, without engrossing the prohibitive and irritant clauses in his retour, because this act of contravention on his part could not affect the entail. Besides, it is only an heir who serves generally to his predecessor that becomes liable universally under the passive title. But this rule ought not to apply to an heir of entail.

*Pleaded for the Respondents:—*Charles Maitland was an heir male in the sense indicated by the ex-

press destination of the entail; and as that entail only laid the restrictions against contracting debt on the heirs female and not on heirs male, it was competent for him not only to contract debt, but also to make up his title without inserting in his retour the prohibitory, irritant, and resolute clauses in the entail. It is obvious that the term, heirs female, as used in the first clause is descriptive of daughters, in contra-distinction to males descended of their body. Thus, "to Jane Maitland, my eldest daughter, *and the heirs male of her body.*" But even if it were more doubtful than it appears, it would not avail the appellant, because in the entail there is no clause annulling the debts contracted, and the resolute clause, being thus defective, leaves the estate open to the debts of the heirs of entail. He cannot pretend to maintain that he is not liable in the passive titles, because he has entered without inventory on the possession of his ancestor's estate, and this is sufficient to subject him, whether he enter as heir of line, or of provision, or of tailzie, &c., and whether by general or special service.

After hearing counsel, it was

Ordered and adjudged that the said appeal be dismissed, and the interlocutors be affirmed.

For Appellant, *C. York, S. Frazer.*

For Respondents, *Robert Dundas, Al. Forrester.*

Note.—Unreported in Court of Session.

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[M. 2340.]

DUKE OF ROXBURGH, - - - *Appellant.*
JEFFREY and Others, (Kelso case) *Respondents.*

House of Lords, 18th March 1757.

BURGH.—DUES AND CUSTOMS—SERVITUDE—PRESCRIPTION.—

1st, Held though the merchants of Kelso could produce no charter or seal of cause, yet that they were a burgh of barony by the charter in favour of the Earl of Roxburgh erecting his lands and the town into a barony. But, 2d, That their right of entering burgesses, &c., was subject to his regulation and control. 3d, That they were not entitled to uplift the dues and customs, and their claim to have the past dues and customs applied to the common good of the burgh was prescribed. 4th, That though they had immemorial possession of a right of bleaching skins, and drying and washing linen on the island of Ana, yet they had not acquired any servitude over it.

No.

BEFORE the Reformation the lands and village of Kelso had belonged to the abbots and monastery of Kelso. They afterwards came into the possession of the Earl of Roxburgh. Thereafter a contract was entered into between His Majesty and the Earl, whereby, on resigning these lands, comprehending the town and lands of Kelso, with the customs and dues of the town, His Majesty agreed to give a charter, “erecting the said town of Kelso, with all
“and sundry lands, tenements, cottages, houses, and
“all other pertinents within the territory of the
“same, in ane free Burgh of Barony, to be called in
“all time coming the Burgh of Kelso, with all liberties and privileges of Burgh of Barony, and to hold
“weekly upon Saturday ane market-day,” and “with
“power to hold two fairs, and with power to this
“said Earl to elect and choose bailies, clerks, offi-

“cers, and to uplift customs and duties of the same ^{1757.}
 “markets and fairs, and also uniting the same lands, ^{ROXBURGH}
 “milns, and Burgh of Barony, to be called the ^{v.} ^{JEFFREY, & .}
 “Lordship and Barony of Haliden.”

In terms of this contract a charter was granted to ^{1634.}
 the Earl by the Crown, in terms as above, erecting
 the Burgh of Kelso into a Burgh of Barony, with
 right to the Earl to admit burgesses, and to uplift
 the customs and duties of the market and fairs. It
 contains no obligation on him to be accountable for
 these any more than for the rents of the other pre-
 mises; but it contains this clause, “custumas et di-
 “vorias earundem recipiendi et levandi, et *easdem*
 “*ad commune bonum dicti burghi applicandi.*”

This clause, authorizing the customs and dues to
 be applied to the uses and good of the burgh, was
 not in the contract, which was the warrant of the
 charter.

In the subsequent charters this clause, “ad com-
 “mune bonum burghi” was omitted: The customs
 and dues were constantly levied by the Duke, and,
 until lately, the respondents had but one cause of
 complaint, which was, that the appellant did not re-
 gularly apply the whole customs to the good of the
 burgh. The Earl never exercised the powers conferred
 upon him. He never admitted burgesses, who might
 have constituted a body politic or corporate: but in
 all time there were bakers, brewers, butchers, and
 other craftsmen in the burgh, who, in process of time,
 formed themselves into societies, and made bye-laws,
 which were approved of by the Earl of Roxburgh,
 but without possessing any express grant or seal of
 cause. Having assumed exclusive privileges of a
 body corporate, in preventing other craftsmen from
 setting up in town, and the exercise of other rights,

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the late Duke of Roxburgh revoked these regulations, and interfered otherwise with what they conceived their rights; whereupon the craftsmen brought the present action of declarator, to have it found and declared, 1st, That in virtue of the foresaid charter they had been, passed the memory of man, settled and established into six incorporations, and had enjoyed exclusive privileges of prosecuting their trades within the burgh. 2^d, That the incorporation was entitled to the customs of the weekly markets, and of the two fairs granted for the good of the burgh, and the Duke having uplifted these dues, was bound to apply them to the good of the burgh in terms of the charter 1634. 3^d, That there was a piece of ground lying opposite to the Milns of Kelso, in the river Tweed, described to be the Island of Ana, which the skimmers had immemorially made use of for drying their leather and skins, and the whole inhabitants for drying and washing their clothes, until of late they were debarred therefrom. Defences,—1. No erection into a corporation, no seal of cause, and no grant conferring any such privileges. 2. The craftsmen had no right to exact customs or dues, or to prevent other craftsmen from setting up in the burgh; and the charter 1634 founded on did not confer on them any such exclusive privileges. The claim on the Duke to apply the customs and dues uplifted in times past, to the common good of the burgh, was prescribed by the negative prescription. 3. The Duke of Roxburgh, being proprietor of the lands on both sides of the river Tweed, both above and below the island in question, the said island, called Ana, situated in the middle of the stream, which had been recently separated from his other lands, by an irruption of the river, was in law a part of his

property, and he was entitled to exclude the crafts-
men and the inhabitants of the burgh therefrom, who could neither allege nor prove any right of pro-
perty, or right of servitude over it. They had no title from him, or any other. And there was no *prædium dominans* belonging to them, to which such servitude could attach.

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The Lords, of this date, found that the “ pursuers,
“ the merchants, and the several crafts, are incorpo-
“ rations, having perpetual succession, subject never-
“ theless to such proper regulations as the Duke of
“ Roxburgh and his successors, Barons of the Burgh
“ of Kelso, shall by themselves or their bailies make,
“ touching the government of the said corporation, or
“ admission of new entrants; the said regulations be-
“ ing always for the good and well-being of the said
“ corporation and burgh. And found, and hereby find,
“ that the Duke of Roxburgh, by his rights erecting
“ the said burgh, is obliged to apply the whole reve-
“ nue arising from the customs of the weekly markets,
“ and two annual fairs, for the good of the town, and
“ that the application of the custom, commonly called
“ the spoon and ladle, for a salary to the bailie of
“ the said burgh, is a proper application thereof, and
“ for the good of the burgh; and found and hereby
“ find it proven by the defender’s admission, that
“ the burgesses, inhabitants of the said burgh, have
“ been immemorially in the constant uninterrupted
“ possession of whitening and drying their linen on
“ the island called the Ana or Sandbed. And therefore
“ found and hereby find them entitled to continue
“ their said possession of whitening and drying their
“ linen there as formerly, and remitted to the Lord
“ Ordinary.” On petitions and representations the
Court “ adhered, and hereby adhere, to the first part

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“ of their former interlocutor, finding the pursuers,
“ the merchants and several crafts of the town of
“ Kelso, are incorporations, having perpetual succe-
“ sion, subjected to such proper regulation as the
“ Duke of Roxburgh and his successors, Barons of
“ the Burgh of Kelso, shall by themselves or their
“ bailie make, touching the government of the said
“ incorporations; repelled and hereby repel the de-
“ fence offered for the Duke with respect to the appli-
“ cation of the customs and duties of the two annual
“ fairs and weekly markets; and repelled, and hereby
“ repel the defence made for the Duke, founded on
“ the charter 1747, and subsequent charters granted
“ by the Crown to the Duke’s predecessors; and repel-
“ led and hereby repel the defence of the positive and
“ negative prescription with respect to the custom of
“ the fairs and weekly markets; and repelled and
“ hereby repel the defence of the right to the cus-
“ toms, alleged to belong to Learmont and Healley,
“ in respect no such right is produced. But granted
“ diligence, at the defender’s instance, for recover-
“ ing these rights; and when they are recovered,
“ remitted to the Lord Prestongrange, in place of
“ the Lord Elchies, to hear parties’ procurators
“ thereon, and to do therein as he should see cause:
“ and found, and hereby find it proven, by the
“ defender’s admission, that the burgesses and in-
“ habitants of the said burgh have been immemo-
“ rially in the uninterrupted possession of whiten-
“ ing and drying their linen upon the island called
“ the Ana or Sandbed; therefore found and hereby
“ find them entitled to continue the said possession,
“ and remitted to the Lord Ordinary to hear parties’
“ procurators how they are to have access to the use
“ of the said Ana or Sandbed, with the least prejudice

“ to the defender’s the Duke of Roxburgh’s property.”

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After another petition the Court adhered. Against these interlocutors the present appeal was brought.

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Pleaded for the Appellant:—1st, That the respondents were never erected into a body corporate, and could not hold exclusive privileges as such. That they were never so erected by any of the grants from the Crown above set forth; all these grants being in favour of the Earl of Roxburgh, with power to him and his successors to admit free burgesses as they should think fit; and the Earl had never created any bodies politic or corporate within the Burgh of Kelso; and until this was done no acts or regulations of their own could constitute them into a corporation. 2d, That the charter 1634, with the clause, “ *et easdem ad commune bonum dicte burgi applicandi*,” did not confer the privilege of corporation, or any right to exact the dues and customs. These were conferred on the Baron; and the clause therein of applying them to the common good of the burgh did not originally form a part of his right, and was consequently, in the charter of 1647 and subsequent charters, entirely omitted. 3d, In regard to the island, this being his exclusive property, the pursuers adduce no title or right to the same acquired from him. They do not aver any title by which they could acquire a right by prescription. Nor could the use of it for bleaching and drying belong to them as a right of servitude, because there was no dominant tenement for whose benefit it could be acquired.

Pleaded for the Respondents:—1st, The burgesses and inhabitants of the burgh of Kelso are corporations, having perpetual succession, which are not liable to be abolished and extinguished at the pleasure of the Duke of Roxburgh. They have enjoyed pri-

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vileges as a corporation for time out of mind, subject to regulations approvable by the Baron; the latter only exercising his right for their common good. 2d, The erection of the town of Kelso into a Burgh of Barony, although contained in the charter in favour of the Earl, was a sufficient title to them, and a sufficient seal of cause; and seeing the Earl had levied the dues and customs himself, and was bound to apply them to the common good of the burgh by the earlier charter of 1634, it made no difference that the subsequent charters omitted this clause, as the burgh had been in immemorial use and wont of exacting these dues, and applying them to the common good of the burgh. 3d, And as to the island of Ana, by charters 1614 and 1634, the burgh is erected "cum omnis et singulis terris, tenementis, &c., et singulis suis pertinentiis," and the burgesses and inhabitants having possessed the island as a pertinent, the same must be presumed to be comprehended within the grants of the Crown, which being confirmed and followed by prescriptive possession, is at once a sufficient title.

After hearing counsel upon the

Petition of the Duke of Roxburgh, as also upon the answer of Ninian Jeffrey, treasurer of the Merchant Company in the burgh of Kelso, and others, for themselves, and as being the representatives of the several corporations of the said borough, and of the owners of feus and tenements, and of the other burgesses and inhabitants of that burgh, it was ordered and adjudged that after the words "government of the said incorporations," these words be inserted—"or admission of new entrants, without prejudice to any question that may arise touching the reasonableness of the entries or upsets, or

other conditions to be imposed on any such admissions, or touching any claim of exclusive privileges of trafficking or trading within the said burgh." And it is hereby ordered and adjudged, *That the remaining part of the said interlocutor be, and the same is hereby reversed; and that the defences offered for the appellant with respect to the customs and duties, and the little island called Ana, or the Sandbed, be sustained; and that as to the said customs and duties, and the said little island, the appellant be assoilzied. And it is further ordered and adjudged, That the said interlocutor, and the said interlocutors of the 18th February 1755, adhering thereto, so far as the same are not reversed or varied as aforesaid, be, and the same are hereby affirmed.*

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For Appellants, *Rob. Dundas, C. Yorke.*

For Respondent, *Al. Forrester, Al. Wedderburn.*

Note.—The particular ground upon which the reversal in the House of Lords proceeded, in regard to the island of Ana, not being known and not appearing, leaves the case in uncertainty; but as the House of Lords has sustained the Duke's special defence on this head, the grounds of the reversal must, it is presumed, be found within that defence.

Lord Kames, as to the first point, says that "the difficulty in the case was, that no seals of cause were produced. This difficulty was surmounted upon the following considerations. By the erection of a village into a burgh of barony, &c., the houses are incorporated into one feudal subject, and the inhabitants are also united into an incorporation, which holds the feudal subject of the Baron. Next, by erection of every burgh, whether of royalty, regality, or barony, certain exclusive privileges of trade are understood to be granted to the incorporation; because such is the purpose and motive for erecting a burgh. Therefore the town of Kelso enjoys those exclusive privileges without the necessity of alleging that seals of cause were granted by the Baron." On the second point he says,—*"The defence was, that this claim was lost by the negative prescription."*—Kames, p. 98 et 100; Elchies, p. 100, *Notes.*

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BLACKWOOD

v.

ALLAN.

[M. 6991.]

ROBERT BLACKWOOD of Petrevie, - *Appellant.*
 HENRY ALLAN and OTHERS, - - *Respondent.*

House of Lords, 23d March 1757.

INHIBITION.—An inhibition sustained which was objected to as setting forth two separate debts by bond, in the narrative of the letters, while the will only referred to a bond without distinguishing which, the omission of the letter S in the word “bond” being a clerical error.

A RANKING and sale of the estate of Dudhope was brought, over which several heritable securities were granted. Upon one of these heritable bonds, an inhibition at the instance of Allan was led, and the question in the ranking was, whether his inhibition was effectual to secure a preference over a subsequent disposition in security? The objection stated to the inhibition was, that it was null and void, in respect that in the narrative of the letters, it set forth, that Robert Allan was creditor to Sir George Hamilton, by bond, for the sum of L.4000 Scots, and that he was creditor to the said Sir George Hamilton, and Sir Robert Milne, by another bond, in the sum of 3000 merks; yet the *will* of these letters ran thus:—Our will is, “&c.—That ye prohibit and discharge the said Sir George Hamilton and Sir Robert Milne to wad-
 “set, dispone,” &c., “in prejudice of the said com-
 “plainer, anent the implement and fulfilling to him
 “of the aforesaid *bond*.” The will, the use of the word “bond” in place of “bonds,” made it uncertain to which of the bonds the warrant applied. The executions returned by the messenger against the debtors, and also against the lieges, were in precisely

the same words. It was therefore contended that the inhibition was void and null by reason of uncertainty. It was answered:—That the objection was founded merely on the inaccuracy of the writer of the inhibition. It was a mere clerical omission of the letter S, and ought to be disregarded, because it was apparent from the narrative of the inhibition what bonds were meant; and although the executions bore the same error, yet, as they contained a general clause that all was done conform to the tenor of the principal *letters*, the preamble of which mentions both bonds, they ought to be sustained.

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ALLAN.

The Lord Ordinary at first sustained the objection Dec. 5, 1749. to the inhibition; but on representation and reference being made to the case of *Maclellan v. Allan*, 8th July 1725, where, in a competition between Sir George Hamilton's creditors, the same objection was stated then to the inhibition that is now stated; the Court overruled it; and he therefore maintained that the same judgment ought to be applied in this case.

The Lord Ordinary repelled the objection to the inhibition, in respect of the former judgment in the case alluded to. And on reclaiming petition, the Court adhered.

June 27,
1750.
Nov. 6, 1750.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—That an inhibition was a writ which must be correct in all its parts, particularly in so essential a part as the will, which is the warrant for execution. In the present case that warrant is defective. It does not specify clearly the debt in respect of which it is granted. The narrative of the inhibition sets forth two separate and distinct bonds, unconnected the one with the other, but the will only refers to one bond, without speci-

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fying which, and therefore it is impossible the inhibition can be good for anything. The supplying the letter S in the register of inhibitions was unauthorized and improper, and did not remedy the defect.

Pleaded for the Respondent:—It clearly appears, from the various steps of procedure, that the inhibition proceeds upon the *bonds*; and therefore the objection, in the strongest light, is founded on a trifling clerical error, namely, on the omission of the single letter S, which, neither in law nor equity, ought to vitiate the inhibition so as to destroy the preferable right of a creditor under it, against whose debt otherwise no other objection applies, or is pleadable. This error, though appearing in the will of the letters of inhibition, was correctly inserted in the record of inhibitions, which ought to suffice. And the objection is *res judicata*, because it was pleaded before against the same inhibition, and repelled by the Court in 1725.

After hearing counsel, it was

Ordered and adjudged the said appeal be dismissed, and that the said interlocutor complained of be, and the same is hereby affirmed with costs.

For Appellant, *Al. Forrester, Al. Wedderburn.*

For Respondents, *Rob, Duudas, C. Yorke.*

Note.—Lord Elchies has this Note, p. 209, “Inhibition.” “In the register (of inhibitions), they had erroneously added the letter S, and I at first sustained the objection; but afterwards on showing me a decret, 8th July 1725, in a question on this very inhibition, with Callender of Craigforth, where the same objection was repelled, I thought it did not become me to contradict a judgment in point of the whole Court, therefore I gave my interlocutor in respect of that former judgment, repelling the objection. Pittrivie reclaimed, and the President and others were

of my opinion, that when preference is claimed on legal diligence, especially when that diligence is used to reduce onerous transactions as being *spreta auctoritate*, that if there be any defect in the diligence, equity cannot interpose to supply it. And I observed further, that there was more here wanting than the letter S, because Sir Robert Milne could not be inhibited on both bonds. But on the question, it carried, to adhere to my interlocutor, *renit. President et me.*"

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v.
CRAIK.

JEAN CRAIK and JOHN STEWART her	}	<i>Appellants.</i>
husband, - - - -		
GRIZEL CRAIK, only surviving daugh-	}	<i>Respondent.</i>
ter of Adam Craik, - - -		

House of Lords, 25th March 1757.

ENTAIL—PROVISION—EQUITY.—An entail empowered the next heir to grant provisions to his younger children; but he conceiving that the entail so executed was in fraud of his father's marriage-contract, which provided the fee of the estate to the heir of the marriage, disposed the estate in fee to his own daughter, and did not exercise the powers conferred of granting provisions. Held, on reduction of the son's settlement, as in fraud of the entail, that when she was deprived of the benefit of her father's settlement, equity will support that deed to the extent of a reasonable provision, although the powers of the entail in this respect had not been exercised.

For the circumstances of this case see p. 542.

The House of Lords, in affirming the judgment of the Court of Session, specially reserved power to the respondent to claim a provision out of the estate, her father having, by the entail of 1723, a power to provide such provisions to younger children; and in the present action she now contended that the settlement of the estate on her by her father, although adjudged to have been *ultra vires* of the father, yet

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ought to be sustained to the extent of a reasonable provision, and concluding to have that portion ascertained. Proof was ordered of the rental of the estate. It was proved that this was only a trifle more than what it was at her father's death.

The Court, by a majority, found that the pursuer was entitled to the sum of L.1500 sterling, as a provision out of the estate of Duchrae.

Against these interlocutors the present appeal was brought by the appellant, and a cross appeal by the respondent, complaining of the interlocutors in so far as they only allowed her a provision of L.1500 out of the estate.

Pleaded for the Appellants:—That in law the respondent had no title to a provision out of the estate, as none such had been granted her. And it does not follow that, because her father, Adam Craik, had a power to grant such provisions—a power which he never exercised, that therefore his daughter has a claim for such provision. On the contrary, such power never having been exercised, any provision to the respondent can only be conferred by the appellant's consent; and the appellant, moved by equitable considerations, having consented that a reasonable provision be awarded to her, ought not to have been burdened with a provision so great as the Court has allowed, which is exorbitant, and far exceeds what this small estate can bear. The sum of L.1500 is near thirteen years purchase of the estate.

Pleaded for the Respondent:—The estate of Duchrae originally stood vested in her father in fee, under his marriage-contract. Thereafter the entail was executed by his father, under which the appellant was favoured; while the deed of her own father,

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which conveyed the estate to her as his only daughter, was set aside. When, therefore, she is deprived from taking the entire benefit, equity will support her father's settlement so far as to hold it as an exercise of the power conferred on him by the entail to the extent of a reasonable provision. Looking therefore to the value of the estate—to the intention of the testator to bestow the whole upon her—the manner in which his intention was disappointed—the provision allowed by the Court is reasonable in the whole circumstances.

After hearing counsel, it was

Ordered and adjudged, that the appeals be dismissed, and that the last mentioned interlocutor of 25th February 1756, and also so much of the said first mentioned interlocutor of the 19th November 1755 as is not thereby varied, be affirmed.

For Appellants, *C. Yorke, Walter Stewart.*

For Respondent, *Robert Dundas, Al. Forrester.*

Note.—Unreported in the Court of Session.

THE RIGHT HONOURABLE LORD GRAY }
and LADY GRAY, - - - } *Appellants.*

MAGISTRATES and TOWN COUNCIL OF }
PERTH, - - - - - } *Respondents.*

House of Lords, 30th March 1757.

SALMON-FISHING—GRANT—DRAWING NETS ON BANK.—A prior grant to a party of the salmon-fishing in and round an island on a river, without any limitation as to drawing the nets, does not prevent the Crown from making a posterior grant to another party whose lands are opposite to the island; and where the channel is so narrow as not to permit both

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fishing without encroaching on each other, the parties have an alternate right of fishing.

THE appellants held their lands situated on the banks of the Tay "*cum piscariis salmonum aliorumque piscium in aqua de Tay,*" and under this right and holding, alleged that they and their ancestors had been immemorially in possession of the whole fishings on the *north side* of the Tay, within the limits of their lands; and being desirous of improving their fishing, they cleared the channel of the river in those places where the stones obstructed the drawing of their nets, in particular between their two fishing stations called Hempdome and Cruikhead—one of which was above, the other below, the Island of Sleepless, belonging to the respondents.

The respondents had a prior grant from the Crown of the Island of Sleepless, with the salmon-fishing around it, and when the appellants proceeded to erect a fishing station, called the Pye Road, on their own side, and between Hempdome and Cruikhead, and directly opposite to the Island of Sleepless, the respondents objected, stating that this fishing station was an encroachment on their right of fishing, and raised the present declarator, setting forth that they had, both by title and by immemorial possession, right to the whole fishings around and upon every part of the Island of Sleepless, and concluding to have it found that the fishings upon the lead and channel of the river, interjected betwixt the said Island and the opposite north bank of the said Tay, was their exclusive property. They further stated, that the channel of the river between the said island and the opposite shore, where this new station was erected, was so narrow as to prevent both fishing

without encroachment on the other. That where a salmon-fishing is granted by the Crown upon a part of a river, without limiting the granter to the particular part where his nets are to be drawn, the whole salmon-fishing is granted. The grantee may draw his nets on both sides of the river; and this right had been confirmed by immemorial possession, as confirmatory of their grant from the Crown, which grant was anterior to that of the appellant. In defence, it was stated that the respondents' grant of the Island of Sleepless, with the salmon-fishing around it, could not carry anything more than a grant of lands on one side of a river, with the fishing on that side, which certainly imports no more, than the right of fishing in the river, and drawing the nets on the side where the lands lye, but *not* the privilege of drawing the nets on the opposite side; and that a grant of the Island of Sleepless, with the salmon-fishing round that island, does not so divest the Crown as to prevent it from giving a posterior grant of fishing on the opposite side.

The Court, of this date, found, "that the town of Perth, pursuers, have the only exclusive right of fishing upon the lead and channel of the river interjected betwixt the Island of Sleepless and opposite north bank of the said river, and the defenders (appellants) have no right to fish in that part of the river, and decern and declare accordingly." A reclaiming petition was presented praying a proof. A proof was allowed and led, from which it appeared, that the fishing at the Pye Road station might be exercised without interfering with the fishing belonging to the town of Perth, at and around the Island of Sleepless. After hearing parties on the import of the proof, the Court adhered.

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 &C. OF PERTH.

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10th Jan.
 1750.

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&C. OF PERTH.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellants :—*That the grant of salmon fishing around an island does not give right of fishing or drawing nets on the opposite shore. Such a grant cannot carry more than the lands on one side of river, with a right of fishing on that side, and does not import such a right of fishing as entitles the respondents to draw their nets on the opposite side; although no limitation is expressed as to the place where these nets are to be drawn. Nor does such grant so entirely divest the Crown, as to prevent it from conferring a posterior right of fishing on the opposite side; and consequently that the Crown may, notwithstanding such grant, establish a fishing on the banks of the river opposite to the former fishing, and so the first grant cannot carry an exclusive right of fishing on both sides of the river. The respondents' grant was limited to fishing in the channel next or adjacent to the Island of Sleepless, and drawing their nets thereon; and therefore being so expressly limited, they could not prescribe a right beyond those limits. That by the proof adduced, it was clear that the fishing at Pye Road station can be carried on without interfering with the respondents' right of fishing, and the practice was in such narrow channels to fish alternately, which was the practice in eleven different fishings on the Tay, where the heritors on the different sides fish in this manner.

*Pleaded for the Respondents :—*That by the respondents' charter, the town of Perth acquired right to the salmon fishing in the river Tay, close to and around the Island of Sleepless on all sides; and the Crown having granted this full and ample right,

could not thereafter confer on the appellants the salmon fishings adjacent to the Island of Sleepless, because where a salmon fishing is granted by the Crown upon a river, without limiting it to a particular part, where his nets are to be drawn, the whole salmon fishing is granted, and the grantee may draw his nets on both sides of the river. The respondents have had immemorial possession conform to this extent and measure of their right, without dispute, and have therefore acquired a prescriptive title.

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After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is hereby declared, that the appellants are entitled to an alternate right of fishing upon that part of the river in question, and it is therefore ordered that their defence be sustained, and that they be assoilzied.

For Appellants, C. Yorke, Al. Wedderburn.

For Respondents, R. Dundas, Al. Forrester, Fred. Campbell.

Note.—Unreported in the Court of Session.

[M. 10956.]

Mrs MARY MONYPENNY, widow of
John Ayton younger, and MARY and
JEAN their daughters; and JAMES
AYTON (formerly Monypenny) -

Appellants.

THOMAS AYTON, second son to John
Ayton the elder, and brother to
John Ayton the younger, -

Respondent.

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House of Lords, 11th May 1757.

PRESCRIPTION OF ENTAIL—MINORITY.—An entail was executed of an estate, but allowed to lie dormant for eighty years, during which the succeeding heirs had possessed on a different title in fee-simple. Held that the limitations in the entail were worked off and prescribed by the forty years' possession had on this absolute title, and that the minority of heirs substitutes of entail did not interrupt the prescription.

1672. SIR JOHN AYTON executed a deed of tailzie in 1672, in favour of his nephew John Ayton, and the *heirs male* of his body, containing the usual prohibitive, irritant, and resolute clauses of a strict entail, directed against alienating, impignoring, or disposing, or altering the order of succession.

This entail was never recorded, and lay in the maker's repositories for a period of eighty years dormant, without having been made use of as a part of the title to the estate.

April 30, 1676. On Sir John Ayton the maker's death, his nephew disregarding this entail entirely, and taking up the estate as heir of line, completed his title by a service as nearest and lawful heir of the deceased Sir John, and was thereupon infeft.

March 18, 1709. This John Ayton had three sons, John, David, and Thomas. On John the son's marriage with the appellant Mary Monypenny, the estate was disposed "to the said John Ayton the younger, and the *heirs male* of his body." Of this marriage there were Alexander, David, and the appellants Mary and Jean. Upon their father's and grandfather's death, Alexander succeeded to the estates, and made up his title by general service, as nearest and lawful heir to his father, and was infeft. He thereafter made a settlement of the estate in favour of "himself

“ and the heirs of his body; whom failing, to David
 “ Ayton his brother-german, and the heirs of his
 “ body; whom failing, to the appellant, James Mony-
 “ penny, and the heirs of his body;” thus cutting
 off from the succession his own sisters Mary and
 Jean.

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On his death without issue, and also on the death of David his uncle (elder brother to the respondent) and also on the death of his own younger brother David (nephew to the respondent) without issue, Thomas Ayton, the respondent, was heir-male and the next substitute entitled to succeed to the estate by the entail. Having discovered the entail of 1672, he raised the present action of declarator, to have it found that Alexander Ayton had contravened the prohibitions of the entail, and to have his right to succeed to the estate under it declared. The defence was, that the maker never intended this deed to be a proper entail—that it was a mere temporary arrangement; but having been neither recorded nor used as a title, it must be presumed to have been laid aside. At all events, supposing the entail unexceptionable in all respects, the deed, and the whole interests and obligations thereon, having been neglected for eighty years, was now become void, and prescribed by the act 1469, which sets forth that unless the said obligation be followed furth within the space of forty years, the same shall prescribe. But the appellant's right is further established by the positive prescription introduced by the statute 1617. It was answered, That the minority of the prior substitute heir of entail (David) interrupted the prescription. It was replied, that the minority of substitute heirs of entail, and more especially of a prior substitute, could not, in law, be deducted from the currency of the pres-

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cription. That the respondent was not a minor,—that the plea of minority was personal to those entitled to plead it—that he was of age himself fifty years ago, and was not entitled to plead the minority of the substitute heir prior to him.

Feb. 27, 1756. The Court, of this date, pronounced this interlocutor, repelling the defences founded on prescription, and finding, “that the prohibitions in the entail were “perpetual and binding on the several substitutes “after the death of the maker.” And on reclaiming

July 31, 1756. petition, the Court adhered.

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant:—*That the deed of entail executed in 1672, was not to be viewed as an entail, or as a subsisting deed, but in law is to be looked on as one of temporary arrangement, and as one in regard to which the maker had changed his mind. This is supported by the whole circumstances of the case, and the power in the deed to revoke. By the non-delivery, therefore, of the deed, and the neglect of every party interested in it for a period of eighty years, during which it lay dormant without being acted on or recorded, the same must now be viewed as void and prescribed under the act 1469, and to have come to an end. The entail is equally cut off by the positive prescription, as the estate has been held under a different title for more than forty years, thus working off the prohibitive, irritant, and resolute clauses, by force of prescription, under the statute 1617. Nor is it any answer to the plea of prescription to plead the minority of substitute heirs of entail, because in law the minority of substitute-heirs of entail cannot be deducted from the currency of the long prescription, it being settled in the case of Mac-

dougall v. Macdougall, that the minority of such substitutes is not sufficient to interrupt. But even if it were otherwise, the respondent cannot plead it, because he himself is not a minor—has been of age for the last fifty years—and as the plea is personal to the minor himself, he cannot plead the minority of a prior substitute.

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AYTON.

Pleaded for the Respondent :—The plea of prescription stated against the entail is untenable, because prescription can only operate where there are opposite and separate rights vested in different persons at the same time, which not being the case here, prescription could not and did not run against the entail. But if the plea of prescription is at all pleadable, it is effectually barred by the minority of the substitute heirs of entail. It was the minority of these heirs nearest in succession that led to the entail lying so long dormant, and after these are deducted, it appears evident that prescription has not run. And as to the want of recording, by the statute 1685, entails, whether of date prior or posterior to the statute, are binding on heirs though unrecorded. By the entail in question a permanent settlement of the estate was both made and intended; and the limitations therein are now binding on all concerned, and perpetual; and the settlement of Alexander Ayton on the appellants, being a contravention of the entail, was null and void.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is further ordered, that the defences made by the appellants, founded upon the construction of the deed of nomination (entail) of 15th October 1672, and, upon prescription, be

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sustained, and that the said appellants be assoilzied from the suit.

For Appellants, *Rob. Dundas, Al. Forrester.*

For Respondents, *C. Yorke, Dav. Rae.*

Note.—As to the minority of substitutes in an entail being held not to interrupt prescription, see *Macdougall v. Macdougall*, 12th July 1739. The interlocutor in that case was, “that the minority of Thomas or of William Macdougall could not interrupt the prescription, they being only *substitutes* by the *tailzie* 1684.” *M.* 10947. Kames designates this case as the famous case, (*K. De.* p. 165), and it has been a leading case ever since. It was upon the principle of that case that judgment was reversed in the present case of *Ayton*. The House of Lords further considered the respondent barred, as having been himself major for more than forty years during possession on an adverse title. In the case of *Gordon v. Gordon*, 21st December 1784. *Fac. Coll.*, in giving judgment in a plea of the same nature, the Lord President (*Dundas*) observed that “he had heard the case of *Macdougall* judged and revered it. Lord President *Forbes*, and Lord *Arnis-ton*, supported the decision. Its principles were afterwards adopted in the case of *Ayton* by Lord President *Craigie*, and Lord Justice¹ Clerk (*Erskine*), who had been of counsel on the losing side in the case of *Macdougall*; and in the House of Lords the judgment was approved of by Lord Chancellor *Hardwicke* and Lord *Mansfield*.” This question underwent a more thorough investigation in a subsequent case which was twice before the House of Lords.

Vide *Sir Hew Dalrymple v. Fullarton*, House of Lords, 18th Dec. 1797; and *infra*.

ALEXANDER, EARL of CAITHNESS, - *Appellant.*
MARGARET, COUNTESS OF CAITHNESS, *Respondent.*

House of Lords, 18th May 1757.

ALIMENT.—A wife agreed to accept of a separate aliment from her

husband. Held on her insisting that the sum was inadequate, that she was not barred by the agreement from insisting and claiming more; and L.200 per annum, and the interest of her own proper free funds allowed, although this was above the sum provided to her by her ante-nuptial contract of marriage.

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THE appellant was married to the respondent; and by marriage articles entered into, of this date, she was provided, in case she should survive her husband, with an annuity of L.222, 4s. 5d. per annum; this annuity being restricted to L.166, 13s. 4d. in the event of there being one or more children of the marriage.

In 1739 the respondent bore the appellant a daughter. She alleged that about this time he absented himself from her society, and began to slight her. When on the point of lying-in at Edinburgh, he thought fit to retire to Caithness; and when she followed him there to endeavour to reconcile him, he removed to England; and also inhibited her.

To save litigation and exposure of family affairs, she accepted, by agreement entered into between them, of this date, of L.83, 6s. 8d. for her aliment during the time they by mutual consent continued to live separate; but finding it impossible to subsist on this small sum, she raised the present action for L.300 per annum, as a suitable aliment, to endure so long as the Earl persisted in living separate. In defence, the appellant pleaded the agreement and contract of separation entered into, contending that the aliment therein allowed was ample, and, in the circumstances, sufficient to sustain her.

After an enquiry into the rental of the appellant's estate, the Lords of Session unanimously found "the pursuer (respondent) entitled to an additional aliment over and above the aliment contained in the

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“ contract mentioned in the libel, and modified the additional aliment to the sum of L.116, 13s. 4d. sterling, which, with the sum of L.83, 6s. 8d. sterling, contained in the said contract, makes in whole the sum of L.200 sterling. And likewise find the pursuer entitled to the interest of her own proper free funds by way of aliment; also to be payable to her from time to time as the same should be settled, and liquidated, and that over and above the foregoing said sum of L.200 of aliment, modified as above, the same to be payable half-yearly at Martinmas and Whitsunday in all time coming, during the pursuer and defender living separate.”

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant:—The Court have proceeded here to award an aliment without due regard to the particular circumstances of the appellant's estate, or to the legal rights of parties previously settled in that particular. They have looked to the rental of the estate without taking into view the encumbrances with which it is burdened; and it was with a special view to this state of circumstances, and, in particular, the fact, that the L.2000 of this debt was a sum contracted by the Countess before her marriage, that the aliment of L.83 was agreed on; and having so agreed, she was now barred in law from claiming a higher aliment. But even supposing she was not barred by this agreement, and it were still open to her to claim a higher alimony, there is no instance in the law of Scotland where an aliment has been awarded larger in amount than the jointure granted to the wife by the marriage articles. In the present instance the Court has awarded L.33, 6s. 8d. more than her jointure.

Pleaded for the Respondent:—The contract by which she agreed to accept of an allowance of L.83, was signed by her under peculiar circumstances. She was mainly induced to it under the force of necessity, and merely for the sake of peace, and to prevent exposure of family affairs. But finding it utterly inadequate to subsist her, she was obliged to take her course in law, to have a more suitable aliment awarded. The contract cannot bar this recourse, because, in so far as it provides insufficient aliment, it is not binding on her. And looking to the respondent's birth and rank, and to the appellant's income of L.1100 per annum from his estate, the sum allowed by the Court ought to be confirmed, with costs.

After hearing counsel, it was

Ordered and adjudged, that the interlocutor complained of be affirmed.

For Appellant, *C. Yorke, Cha. Hamilton Gordon.*

For Respondent, *Al. Forrester, Dav. Rae.*

Note.—Unreported in Court of Session.

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IN

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ADJUDICATION.—(1.) A creditor having adjudged the estate of his debtor, and likewise the right to an adjudication, which the debtor had led against certain other lands; found that in a question with another adjudger of these lands, he was bound to account for the rents and profits of the former, into possession of which he had entered in virtue of his decree.—*Cooper v. Hunter*, 11th December 1744, p. 376.

— (2.) **PRESCRIPTION OF.**—Held that an action on the debt and adjudication were not sufficient to interrupt prescription, the adjudication (although charter and infestment had followed) being itself prescribed, no possession having followed on it.—*Clarke v. Earl of Home*, 16th April 1753, p. 533.

ADVOCATE AND AGENTS AS HAVERS.—Found that lawyers and agents cited as havers, are bound to answer only such interrogatories touching writings that have come to their knowledge in the course of their employment as might competently be put to their clients.—*Scott v. Napier*, 29th Nov. 1749, p. 441.

AFFREIGHTMENT.—A charter party is not dissolved by the loss of the ship. Freight is still due on the part of the cargo which is saved. A vessel being wrecked, and the freighters having taken possession of part of the goods, and abandoned them to the insurers, found that the whole freight is due for those goods, and that the freighters

are primarily liable. The shipmaster having declined to carry the goods to end of the voyage in another ship, and the owners of the goods having taken them away,—found that freight *pro rata itineris* is due for these, although they proved to be so damaged as to be quite useless; and that the freighters are primarily liable for it.—*Lutwidge v. Gray, &c.*, 23d February 1734, p. 119.

ALIEN—FORFEITURE.—After a party was attainted for high treason, two sons were born to him abroad. And the forfeiture of his entailed estate was declared to endure during the lifetime of the attainted person and his issue male. A claim was lodged by a substitute heir of entail, after the death of the attainted person, but while his sons were still alive, for possession of the estate, on the ground that as the attainted person was now dead, and his sons aliens, and so incapable of succeeding, he was entitled to the estate. Held, on a question of law raised by the Judges in the House of Lords, that as the sons were aliens, and so incapable of succeeding, the interest of the Crown had determined, and the next heir-substitute entitled to succeed,—reversing the judgment of the Court of Session.—*Gordon of Park v. His Majesty's Advocate*, 4th Feb. 1754, p. 558.

ALIMENT.—(1.) The Court of Session having modified aliment to a son, the same was restricted to the allowance which had originally been voluntarily

given by the father.—*Moncrieff v. Moncrieff*, 21st March 1735, p. 162.

ALIMENT OF MINORS.—(2.) *Vide* Prescription.

—(3.) A wife agreed to accept of a separate aliment from her husband. Held on her insisting that the sum was inadequate, that she was not barred by the agreement from insisting and claiming more; and L.200 per annum and the interest of her own proper free funds allowed, although this was above the sum provided to her by her antenuptial contract of marriage.—*Earl of Caithness v. Countess of Caithness*, 18th May 1757, p. 654.

ANNUALRENT.—Interest found not to be due upon a missive not bearing a clause of interest.—*Garden v. Rigg*, 28th Jan. 1748, p. 409.

APPEAL.—*Vide* Process.

Do. Do.

ARRESTMENT.—Arrestment of rents, for security of a sum not payable for four years after the date of the arrestment, ordered to be loosed without caution, or consignment, although the debtor was *vergens ad inopiam*.—*York Building Company v. Sir John Mears*, 24th May 1728, p. 10.

ASSIGNATION.—What sufficient intimation.—*Earl of Aberdeen v. Earl of March, &c.*, 9th April 1730, p. 44.

BANK—LEGAL DILIGENCE.—In a case betwixt the two Banks, it was found by the Court of Session, that neither horning, inhibition, nor arrestment, were competent against the Bank of Scotland, upon their notes, or tickets, the diligence being done in *emulationem*, but reversed in the House of Lords.—*Royal Bank v. Bank of Scotland*, 9th May 1729, p. 14.

BANKRUPT—Act 1621 c. 18.—A debt having been made over by a person in favour of his wife *stante matrimonio*, and by her assigned to a second husband, as part of her tocher; the assignation was found not reducible at the instance of a creditor of the first husband.—*Napier v. Napier*, 29th April 1726, p. 1.

BANKRUPT NOTOUR—Statute 1696.—Held that apprehension by a messenger under a caption, with detention

for a whole night, but without being put in jail, and afterwards allowed to go on part payment of the debt, was a sufficient imprisonment under the act, so as to constitute notour bankruptcy. *Turnbull's Creditors (Erskine, &c.) v. Colonel Scott*, 27th Feb. 1756, p. 614.

BENEFICIUM COMPETENTIE.—Circumstances under which *beneficium competentie* refused to a grandfather in a question with his grandchildren, claiming under their father's marriage contract. (Judgment in absence.)—*Hogs v. Hogs*, 27th March 1750, p. 469.

BILL OF EXCHANGE.—(1.) Action sustained upon a gratuitous bill which had been granted by a man in security, of a promise of marriage, the marriage not having taken place.—*Calder v. Provan*, 12th Jan. 1744, p. 359.

—(2.) Found that one who had retired bills in London *supra protest*, for the honour of the drawer, (who was in Scotland,) was not debarred of his recourse against the drawer, although he did not give notice of the dishonour of the bills for eight days. Also found that this was a sufficient notification of the dishonour of other bills, retired in the same way, although payable after the date of the letter.—*Ochterlony v. Hunter*, 9th April 1745, p. 396.

—(3.) Bills having lain over for twenty-eight years, without protest or demand, it was found by the Court of Session, that no action lay upon them, unless supported by the acceptor's oath upon the verity of his subscription. Reversed in the circumstances of the case.—*Garden v. Rigg*, 28th January 1748, p. 409.

BONA FIDE CONSUMPTION.—An heritor possessing his teinds by virtue of a grant from another as tacksmen, found to be *bona fide* possessor, until interpellated by the titular.—*Easton, &c., v. Stirling*, 27th Feb. 1733, p. 90.

BONA FIDE PAYMENT.—Payment of a certain rate in name of teinds to the minister for forty years without challenge from the titular, found to be a *bona fide* payment *quoad* the whole teinds, and to exoner the heritor of all bygones.—*Easton v. Stirling ut supra*. *Vide* Teinds.

BONA ET MALA FIDES.—An onerous singular successor is not affected by a latent and personal ground of challenge, to which his author's right is subject, he being in *bona fide* right to the estate.—*Stewart and Husband v. Heron*, 30th May 1749, p. 432.

BURGH ROYAL—DESUETUDE—ELECTION.

—(1.) The Acts 1503 c. 80, 1535 c. 26, and 1609 c. 8, which disable persons not being actual traders and residents within the burgh from being elected magistrates, found to be in desuetude. 2. A councillor having been imprisoned on the eve of the election, in virtue of a warrant obtained upon information of the adverse party,—found not sufficient to void the election, there being such a number in favour of it as would have formed a majority notwithstanding he had been present.—*Smollett v. Buntin, &c.*, 19th Feb. 1730, p. 26.

—(2.) A bond entered into by a portion of a body of electors binding themselves to vote according to the opinion of the majority of their number, found to be *contra bonos mores* and illegal. The election annulled. The sett recorded in the books of the convention of royal burghs must be adhered to, notwithstanding that previous contrary practice be alleged.—*Hoggan v. Wardlaw, &c.*, 10th March 1735, p. 148.

—(3.) An action being brought for setting aside the election of magistrates on the ground of irregularities in the previous election of deacons of trades, it was found that the limitation of eight weeks imposed by the statute was to be reckoned from the date of the election of the magistrates, and not from that of the deacons. It was found that, in the event of an equality at the election of a deacon of the trade, the old deacon had a casting vote. It being argued that a person was disqualified for voting at the election of a deacon, because he was bell-man of the burgh, the objection was repelled.—*Heriot &c., v. Ray*, 30th April 1735, p. 171.

—(4.) The meeting for election of magistrates of a burgh being held previous to the usual day, and without due notice, the election was reduced. Circumstances under which an election of

magistrates was reduced as irregular and void.—Act 7 Geo. II. c. —*Marquis of Lothian, &c. v. Haswell, &c.*, 14th April 1738, p. 207.

BURGH (5.) ROYAL BURGH—Act 7 Geo. II. c. 16.—An election of magistrates set aside at common law on account of an unlawful separation of the members by whom they were chosen, although not falling under the above act.—*Ferguson v. M'Crie, &c.*, 7th April 1741, p. 312.

BURGH OF BARONY.—Held though the merchants of Kelso could produce no charter or seal of cause, yet that they were a burgh of barony by the charter in favour of the Earl of Roxburgh, erecting his lands and the town of Kelso into a barony. But, 2d, Their right of entering burgesses, &c., was subject to his regulation and controul; and, 3d, That they were not entitled to uplift the dues and customs, and their claim to have the past dues and customs applied to the common good of the burgh was prescribed. *Vide* also *Servitude*.—*Duke of Roxburgh v. Jeffrey, &c.*, 18th March 1757, p. 632.

CHARTER PARTY.—*Vide* Affreightment.

CLAUSE IN ENTAIL.—In an entail in favour of a daughter *nominatim*, a clause "prohibiting the heirs female of the said Margaret, her body, or any other of the heirs male and of tailzie above written, (except the heirs male of the said Margaret's body), to sell," &c., found to debar the daughter from selling.—*Nairn v. Nairn*, 14th May 1736, p. 192.

—(2.) Found that a clause in an entail providing "that in case any heir of entail should succeed to a certain other estate, he and the heirs male of his body so succeeding should be obliged to denude in favour of the next heir;" and that the estate in that event should be redeemable "from the said heirs male who shall succeed to both the said estates, and his heir male foresaid,"—has not the effect of excluding all the heirs male of the body of the person so succeeding, (so as to make room for the next branch,) but only his eldest son or heir apparent; and the succession opens

- to the second son.—*Leslie v. Leslie*, 29th April, 1742, p. 324.
- CLAUSE IN ENTAIL.—(3.) *Vide* Provision to heirs and children in Tailzie.
- CLAUSE.—*Vide* Substitute and Conditional Institute.
- CLAUSE OF RETURN.—Held affirming the judgment of the Court of Session, that an estate which was conveyed to a party, and his heirs male, failing whom, to return to the Earl of Morton, (the donor,) had become an unlimited fee in the possessor, free of such clause of return, by his possessing for forty years on a charter giving him the absolute fee thereof.—*Douglas v. Douglas*, 25th Jan. 1754, p. 553.
- COMMONTY.—*Vide* Prescription.
- COMPENSATION.—Compensation was pleaded against an heritable bond. Held that this plea was barred by mutual general discharges granted of even date with the bond, which covered all claims prior thereto; and not competent to be pleaded against the party to whom the bond was assigned, although assigned in security.—*Cartwright v. Grant*, 18th March 1755, p. 597.
- CONDITION.—*Vide* Tailzie.
- CONFUSIO.—A bond over an entailed estate being granted to the substitutes in the entail, and the succession to it having opened to the heir in possession of the estate, but he not having made up any title to the bond—it was found that the debt is not extinguished by confusion in his person, but is still a subsisting burden on the estate.—*Irvine v. Cumming, &c.*, 4th May 1733, p. 103.
- CONJUNCT FEE AND LIFERENT.—A wife's estate being disposed in her marriage contract "to the husband and wife,—in conjunct fee and liferent, and to the sons of the marriage; which failing, to the heirs male of the body of her father; which failing, to the heirs female of the marriage; which failing, to the heirs male or female of her body of any other marriage; which failing, to the husband, and the heirs male of his body of any other marriage; which failing, to the wife's heirs whatsoever;"—the fee found to be in the wife.—*Murray and others v. Blair*, 4th April 1739, p. 251.
- CONJUNCT FEE AND LIFERENT.—*Vide* FEE.
- CONQUEST.—What held to fall under conquest in succession thereto.—*Earl of Selkirk v. Duke of Hamilton*, 3d April 1740, p. 271.
- CONSTITUTION OF BURGH.—*Vide* Burgh of Barony.
- CONSTRUCTION.—*Vide* Provision to heirs and children.
- CROWN'S PREROGATIVE.—*Vide* Preference.
- COUNT AND RECKONING.—*Vide* Adjudication, No. 1.
- DAMAGE DONE TO PROPERTY BY MOB—CLAIM FOR DITTO.—*Vide* Public Police.
- DEATHBED.—Whether a renunciation by an apparent heir of his right to challenge *ex capite lecti*, granted to the ancestor while he was in *liege pousie* be binding? Whether such a renunciation granted by two of four apparent heirs be binding on them, the other two not having acceded to the obligation, and the party obtaining it, being thus prevented from fulfilling his part of the conditions of the contract?—*Murray and others v. Sir Francis Kinloch, &c.*, 29th March 1739, p. 245.
- DECLARATOR.—Circumstances in which this action held incompetent.—*Vide* Forfeiture, No. 5.
- DECREET OF SALE.—A decreet of sale does not cut off the right of, or exclude parties not called in the ranking and sale; and the Act 1695 does not protect a purchaser in such a case.—*His Majesty's Advocate v. Urquhart*, 6th February 1755, p. 586.
- DEFENDERS CITED AS HAVERS.—*Vide* Exhibition.
- DELIVERY OF DEED—PROOF OF DITTO.—*Vide* Witness Instrumentary.
- DEVOLUTION CLAUSE.—*Vide* Clause.
- DESUETUDE.—*Vide* Burgh Royal, No. 1.
- DISCHARGE.—A widow being infest for her jointure in certain lands, agreed with the son to accept a restricted sum out of other lands, which being afterwards sequestrated by his creditors, she brought an action against the purchaser and tenants of the first estate for her jointure and bygones;—the claim was sustained. The purchaser having acquired right to a

wadset of the lands, in consideration of which he had reserved a part of the price,—found that the wadset, though prior in date, did not stand in the way of the claim.—Sir Wm. Gordon v. Urquhart, 6th Feb. 1736, p. 176.

DISCHARGE BY MINOR WITHOUT CURATORS—*Vide* Minor.

DISCHARGE (GENERAL).—*Vide* Compensation.

DOMICILE AND LOCUS CONTRACTUS.—*Vide* Prescription, Foreign.

ELECTION.—*Vide* Burgh.

— Ditto, No. 5.

EXHIBITION.—A defender, being cited upon a general diligence against havers, is not obliged to depone or exhibit except upon a special condescendence of the writs called for. A defender being cited under a diligence against havers for proving a trust, found that he is not bound to produce the writs specially condescended upon, if he depone that they contain no clause instructing a trust.—Scott v. Napier, 29th Nov. 1749, p. 441.

EQUITY.—*Vide* Settlement—Provision.

FACILITY.—*Vide* Fraud, No. 2.

FACTOR.—A factor taking bills in his own name from his constituent's debtor, without giving notice thereof to his constituent, found liable for the loss arising from the bankruptcy of the debtor.—Ainslie v. Arbuthnot and Co., 7th Feb. 1743, p. 340.

FALSA DEMONSTRATIO.—(1.) Found that an attainder was not vitiated, although in the Act the person was described by the name of Walkinshaw, instead of "Scotstoun," (the estate of his father,) although at the time he was not infert in any lands.—Walkinshaw v. His Majesty's Advocate, &c., 9th June 1737, p. 197.

— (2.) Alexander, Lord Forbes of Pitsligo, found by the Court of Session to be not attainted by the attainder of "Alexander, Lord Pitsligo." Judgment reversed.—The Lord Advocate v. Alexander, Lord Forbes of Pitsligo, 1st February 1751, p. 482.

FIAR.—(1.) A wife having in her marriage contract conveyed her estate in

favour of her husband and herself in conjunct fee and liferent, and the survivor of them, and the heirs of the marriage; the fee was found to be in the husband, although the wife survived, and there were no heirs of the marriage entitled to succeed, under the contract.—Neilson v. Murray, &c., 14th March 1732, p. 65.

FIAR.—(2.) Where a father by his contract of marriage bound himself to convey his estate to the heirs male of his marriage. Held that the fee was still in him, and that this obligation did not foreclose him from conveying the estate, under the limitations of an entail, in favour of the heir male of the marriage instead of one in fee.—Craik v. Craik, 21st May 1753, p. 542.

— (3.) *Vide* Conjunct Fee and Liferent to Husband and Wife, &c.

— ABSOLUTE AND LIMITED.—(4.) An estate being settled in a marriage contract upon the heirs male of the marriage; whom failing, upon the heirs male of the body of the husband by any other marriage; whom failing, upon the heirs female of the marriage; found that the heir male of the second marriage, who succeeded to the estate, might gratuitously dispose of it to the exclusion of the substitutes, the heirs female of the first marriage.—Edgar v. Maxwell *alias* Johnstone, 31st May 1742, p. 334.

— (5.) A disposition in a marriage contract to the heir of the marriage in fee, with an obligation to infert, and absolute warrandice, imports only a right of succession, and not a *jus crediti*, in a question with onerous creditors.—Sutherland v. Gordon, 7th March 1751, p. 493.

FOREIGN.—(1.) The final sentence of a competent court in a foreign state, forms a sufficient defence *exceptione rei judicate*.—Hamilton v. Dutch East India Company, 4th April 1732, p. 69.

— (2.) A Scotchman dying in England, where his will was duly proved by the executor therein nominated,—it was found that an executor-creditor could not recover in Scotland a debt due upon a bond to the deceased.—Earl of Breadalbane v. Innes,

George Lord Ray, *et alii*, 11th Feb. 1736, p. 181.

FOREIGN.—(3.) Found that the term of prescription is to be applied which is recognised by the law of the debtors' domicile, in opposition to that of the *locus contractus*.—Robertson v. Marquis of Annandale, 10th December 1749, p. 293.

—(4.) Found that persons appointed in England by the Lord Chancellor to manage the affairs of a lunatic, are not thereby entitled to maintain action in Scotland upon the lunatic's right. A power of attorney granted by one who had been judicially declared a lunatic in England, was found a sufficient title to pursue in Scotland for a debt due to him there.—Bayne v. Earl of Sutherland, 13th Feb. 1750, p. 454.

—(5.) A simple contract debt incurred in England, though in that country not affecting the heir of the debtor, may be ground of affecting his landed estate in Scotland.—Fullarton v. Kinloch, p. 265.

—(6.) Held an English executrix not liable to be called to account in the Courts of Scotland.—Cartwrights v. Grant, 19th March 1755, p. 597.

FOREST.—In a question between the heritable keeper of a royal forest and the neighbouring heritors, regarding the boundaries of the forest, the King's Advocate must be made a party.—Earl of Breadalbane v. Menzies, &c., 29th Jan. 1735, p. 146.

FORFEITURE OF FEU.—*Vide* Superior and Vassal.

FORFEITURE.—(1.) *Vide* Irritancy.

—(2.) *Vide Falsa Demonstratio*.

—(3.) A conveyance by a father to his son after the date specified in the Act, (1 Geo. I. c. 20), sustained,—the debts charged on the estate, and for which the son became personally liable, being nearly equal to the value of the lands.—The Lord Advocate v. Lord Boyd, &c., 25th March 1751, p. 498.

—(4.) A person being attainted by virtue of the Act, which declared that if he did not surrender himself before the 12th July following, he should stand attainted of trea-

son from the 18th April preceding;—it was found that the forfeiture did not operate *retro* to the effect of incapacitating him to succeed to property in the interval.—Drummond v. Lord Advocate, 30th April 1751, p. 503.

FORFEITURE.—(5.) Found that by the attainder of the heir in possession of an entailed estate, the estate was forfeited to the Crown, not only during his own life, but so long as there should survive any issue of his body who would have been entitled to succeed under the entail, had there been no attainder; and after *that*, that the estate went to the heir substitute, whose interest could not be cut off by the attainder.—The Lord Advocate v. John Gordon, &c., 21st May 1751, p. 508.

—(6.) Sequel of above case.—*Vide* Aliens.

FRAUD.—(1.) Fraud and circumvention inferred from the distressed state of the granter of a disposition, the deceitful terms of the writings, and the great inequality of the bargain.—Gordon v. Crawford, 28th April 1730, p. 47.

—(2.) A deed reduced upon the head of fraud and circumvention, which were chiefly inferred from the facility of the granter, in conjunction with the very disadvantageous terms of the transaction.—Ferguson v. Maitland, 5th April 1732, p. 73.

—(3.) A disposition to a creditor, and infestment thereon, set aside, having been granted during the currency of a term, which the debtors had taken to produce a progress in an action of adjudication which had been raised against them at the instance of another creditor.—Sir Wm. Billers, &c., v. Duke of Norfolk, &c., 1st May 1739, p. 255.

FRAUD. (4.) An entailed estate was sold for payment of debts by Act of Parliament, applied for and obtained with the concurrence of the appellant and others, substitute heirs of entail. Held (reversing the judgment of the Court of Session) that the appellant was not barred by such concurrence and agreement, nor by the Act of Parliament, from opening up the whole proceedings, and showing that the

debts, fraudulently represented as due, were fictitious, and not chargeable against the estate. — Sir Kenneth Mackenzie v. John Stewart and others, 14th March 1754, p. 578.

FRAUD.—(5.) Reduction of marriage articles on the head of imbecility and fraud, sustained by the Court of Session, in respect of the suspicious and unequal nature of the whole transaction; but reversed in the House of Lords, in respect the marriage had followed thereon, and fraud not proved. Ramsay Irvine v. Irvine, 10th Dec. 1753, p. 547.

— (6.) *Vide* General burden.
FREIGHT, WHEN DUE.—*Vide* Affreightment.

GENERAL BURDEN.—See Fraud No. 3, Wm. Billers v. Duke of Norfolk, &c., 1st May 1739, p. 255.

HEREDITATE JACENTE—STATUTE 1695.
—Held that the statute 1695, as to the passive titles, is a correctory statute, and must be strictly interpreted, and did not apply to the case of an heir who possessed an estate in which his predecessor died unentered, and to which he declined to make up titles.—Grant v. Sutherland, 15th April 1755, p. 605.

HEIR AND EXECUTOR.—(1.) *Vide* Foreign, No. 5.

— (2.) Where the real and personal estate are conveyed to different heirs in virtue of different deeds, each containing a general clause, obliging the persons favoured to pay all the grantor's debts: Held, that such clauses do not alter the ordinary rules of liability between heir and executor.—Campbell v. Campbell, 1st June 1749, p. 436.

HEIR APPARENT.—A debtor having died in apparenay, after having been in possession of an estate for three years, and decrees of constitution and adjudication having been deduced against his infant son, who had been charged to enter heir without renouncing: Found that these decrees were so far effectual against the son as to attach the lands possessed by the father in apparenay.

The possession by a liferentrix of

part of the lands, in virtue of a right not flowing from the heir apparent, is not accounted the possession of the heir, so as to subject the life-rented lands in terms of the statute. Neither was that part of the liferented lands subjected, which the heir-apparent had acquired and possessed under a contract of excambion with the liferentrix.—Grant, &c. v. Sutherland, &c., 11th May 1749, p. 416.

HEIR OF THE MARRIAGE.—(1.) An estate being provided in a marriage-contract "to the heirs of the marriage," the father was found not entitled to settle it by an entail, upon any child, other than the heir of the marriage; and an entail, thus settling it, was reduced as being *contra fidem tabularum nuptialium*.—Stewart v. Graham, &c., 10th Feb. 1744, p. 364.

— (2.) *Vide* Fiar, No. 2.
HEIR FEMALE.—An entail conceived to heirs male, whom failing, to the entailor's daughters by name, and the *heirs male of their body*: Held that a son of one of these daughters was not an heir female, but an heir male, in virtue of the destination.—Forbes v. Skene, &c., 25th January 1757, p. 628.—*Vide* Tailzie, No. 25.

— *Vide* Tailzie, No. 11.
HEIR OF PROVISION.—(1.) Found that the heir of the marriage may gratuitously dispose of the estate conveyed in the marriage-contract.—Murray v. Blair, 4th April 1739, p. 251.

— (2.) *Vide* Service as heir of provision.

HERITAGE.—*Vide* Conquest.

HUSBAND AND WIFE.—(1.) *Vide* Mutual contract.

— (2.) A man having been married privately to A., and lived with her as his wife in public for twenty years, and procreated several children; B. after his death alleged a previous clandestine marriage with him. Mutual declarators were raised, and strong circumstances adduced by B. to establish the first marriage; yet, as she had entirely concealed her pretended marriage during her husband's lifetime, and had several times been in company with him and A. together, and owned her as his wife; it was found that she had not proved her prior marriage.—Cochrane *alias*

Kennedy v. Campbell, 31st Jan. 1753, p. 519.

IDIOTRY.—(1.) In a reduction of a deed *ex capite furoris* after the death of the grantor, a general allegation of idiocy not relevant.—Moodie v. Stewart, 6th Feb. 1730, p. 20.

—(2.) *Vide* Foreign, No. 4.

INDEFINITE PAYMENT.—Two bonds due to the same party being prescribed, and the debtor in them having made an indefinite payment “to account” during the currency of the prescription; it was found that the prescription of both bonds was not thereby interrupted, but that the debtor might impute the payment to either of them. Garden v. Rigg, 28th Jan. 1748, p. 409.

INFERTMENT.—*Vide* General Burden.

INHIBITION.—(1.) A right of succession under a marriage-contract, cannot by inhibition be made effectual against onerous creditors of the father.—Sutherland v. Gordon, 7th March, 1751, p. 493.

—(2.) An inhibition sustained, which was objected to as setting forth two separate debts by bond in the narrative of the letters, while the will only referred to a bond, without distinguishing which, the omission of the letter S in the word “bond,” being a clerical error.—Blackwood v. Allan and Others, 23d March 1757, p. 640.

INTEREST OF DEBT ON ENTAILED ESTATE.—Is heir in possession bound to pay it.—*Vide* Tailzie, No. 24.

IRRITANCY—TAILZIE.—Found that under an entail prohibiting “debts whereby the estate may be adjudged or evicted,” the contracting of personal debts, on which no diligence had followed against the estate, does not infer an irritancy. Found the arrear of an annuity reserved to the entailer, and not of the heir in possession, although the annuity should have been paid by him. The heirs being prohibited under an irritancy from “contracting debts or doing other deeds of omission or commission, whereby the lands or any part thereof may be adjudged,” &c., and the entailer’s widow having led adjudication for the arrears of her

annuity, found that the right of the heir in possession was not thereby irritated.—Stewart v. Denham, 8th April 1742, p. 316.

IRRITANCY—TAILZIE. (2.) A. conveyed his estate to the second son of B., and appointed trustees (three of whom were declared to be a quorum) to direct his education. He at the same time left a sum of money to B.’s eldest son, on condition that B. did not interfere with or hinder his trustees in the management of the second son. In a claim for repetition of the money on the ground of B.’s interference, it was found that the forfeiture was not incurred, a quorum of the trustees never having acted.—Charteris v. the Lord Advocate, 22d Feb. 1750, p. 463.

JUS TERTII.—It being objected to the title of an heir pursuing a reduction of his ancestor’s deed, as a contravention of the entail—that the contravention implied the forfeiture of his own right—the objection was repelled as being *jus tertii* to one who did not claim under the entail.—Duke of Roxburgh v. Don, 5th March 1734, p. 126.

—(2.) A trust for payment of such of the creditors of the grantor’s son, as the trustee should agree, and compound with, and declaring that no action or diligence thereon should be competent to any of the creditors; but, on the contrary, that they should thereby forfeit all interest in the same; and the trustees having for a length of time taken no steps toward a distribution, action was sustained at the instance of the whole creditors, for the purpose of calling the trustees to account for their intromissions with the trust estate. Action being raised against the representatives of the original trustees without opposition from the substitute trustee, it was found to be *jus tertii* to the representatives to object to the above forfeiting clause.—Duke of Hamilton, &c., v. Earl of Haddington, &c., 16th Jan. 1750, p. 447.

JUS CREDITI.—A provision in a marriage-contract of certain sums in favour of the wife failing children, or in the event of their deaths in minor-

ity, and unmarried, found to be a *jus crediti*, and not a right of succession.—*Burden v. Smith*, April 1738, p. 214.

KINDLY TENANT.—*Vide* Tack.

LEGAL DILIGENCE.—*Vide* Bank.

LEGACY.—Found that a legacy to a person, his heirs, executors, and assignees, depending upon an uncertain condition, does not lapse by the death of the legatee, before the condition is purified. Found that a legacy in these terms does not vest in the legatee, so as to bestow on him any transmissible right, but that, on the condition being purified, it vests for the first time in the person of his executor.—*Burden v. Smith*, 27th April 1738, p. 215.

LEGITIM.—Found that the claim of *legitim* was not cut off by death-bed or gratuitous deeds, although the whole stock and conquest were provided to the children of the marriage, it not being declared that this was in satisfaction of the *legitim*.—Same case, *ut supra*.

LITIGIOUS.—*Vide* General Burden.

LITERARY PROPERTY.—Found in the House of Lords, that an action on the statute 8 Anne, c. 19, was improperly and inconsistently brought, by demanding at same time damages for books surreptitiously sold, and also the penalties of the act; and likewise, by joining in the same summons several pursuers claiming distinct and independent rights in different books.—*Midwinter, &c., v. Kincaid, &c.* 11th Feb. 1751, p. 488.

MARRIAGE CONTRACT.—*Vide* Minor.

MARRIAGE CONSTITUTION OF DITTO.—*Vide* Husband and Wife.

MARRIAGE ARTICLES, REDUCTION OF DITTO.—*Vide* Fraud.

MARRIAGE CONTRACT.—Father's powers, *Vide* Fiar No. 2.

MEMBER OF PARLIAMENT.—*Vide* Burgh, No. 2.

—No action lies upon the statute 7 Geo. II., c. 16, against the sheriff for making a double return; but action lies against the clerk chosen by the minority of the meeting, who secede from the rest, for returning to the sheriff the candidate elected by that

minority.—*Campbell v. Hume*, 1st March 1743, p. 346.

MINOR.—A discharge by a minor without curators of part of the tocher stipulated in his contract of marriage, being granted privately before solemnization of the marriage, and without the concurrence of the friends who were assisting him in the marriage treaty, reduced at the instance of the granter, on the head of minority and lesion, and as being *contra fidem tabularum nuptialium*.—*Morrison v. Viscount Arbutnot*, March 1728, p. 7.

—Found that curators or administrators cannot directly alter the minor's or constituent's succession, by taking bonds, secluding executors in lieu of bonds to heirs and executors, without the consent of the minor or constituent. — *Wauchope &c. v. Wauchope*, 14th June 1737, p. 200.

MUTUAL CONTRACT.—*Vide* Affreightment.

—*Vide* Jus Crediti et Legacy.

—*Vide* Passive Title.

—*Vide* Deathbed.

—*Vide* Heir of the Marriage.

NON-ENTRY.—Found that vassals who had been in non-entry for upwards of forty years, were not liable in the arrears of the retoured duties, it being uncertain in whom the right to the superiority of the lands was vested during that period.—*Chalmers v. Alison, &c.*, 9th May 1746, p. 404.

NOTICE OF DISHONOUR.—*Vide* Bill of Exchange, No. 2.

NOTARY'S DOCQUET AND MOTTO.—Held no objection to sasine, after so much time, that the notary's docquet did not mention the particular symbols used at giving sasine of patronage, and that the attestation of the notary wanted his motto.—*Lord Advocate v. Urquhart*, 6th Feb. 1759, p. 586.

NOTOUR BANKRUPTCY.—*Vide* Bankrupt.

OATH OF PARTY.—Found to be discretionary with the Court whether or not to grant commission for taking the oath of a party who was out of Scotland at the time.—*Sir Wm. Gordon v. Gordon*, 5th April 1731, p. 60.

—A claim of debt against a Peer being referred to his oath, the Court

of Session found that he was not entitled to have his examination taken upon honour. This point not decided in House of Lords.—Earl of Breadalbane v. Innes, Lord George Reay, &c. 11th Feb. 1736, p. 181.

PACTUM ILLICITUM.—*Vide* Minor.

—— *Vide* Burgh Royal, No. 2.

—— *Vide* Bill of Exchange, No. 1.

PAPIST.—*Vide* Service.

PASSIVE TITLE.—Circumstances of an obligation incurred by an apparent heir, under which the next heir, passing him by, and serving to a remoter ancestor, was found liable without relief against the executry, or other separate estate of the apparent heir.—Marquis of Annandale v. Countess of Hopetoun, 15th February 1739, p. 225.

—— *Vide* Heir-apparent.

—— *Vide* Hereditate Jacente.

PASSIVE REPRESENTATION.—*Vide* Tailzie, No. 25.

PATRONAGE.—A presbytery having moderated a call to present to a vacant charge, *tanquam jure devoluto*; the patron raised a declarator to have it found that he was the undoubted patron, and that he had presented *debito tempore* a qualified person. The Court of Session sustained the action as competent, and decerned in the declarator. Reversed on the ground that the Lord Advocate ought to have been made a party—reserving all objections to the jurisdiction of the Court.—Presbytery of Dunse v. Hay, 28th March 1750, p. 475.

—— *Vide* Decree of Sale, et Witness, No. 3.

PERICULUM.—*Vide* Affreightment.

PERSONAL AND REAL.—The irritant and resolute clauses contained in a charter were not engrossed in the instrument of sasine, but which bore to be given “with and under the conditions and provisions in the charter particularly mentioned.” Found that this was sufficient to make the clause in the charter effectual against creditors and singular successors.—Duke of Argyll v. Earl of Breadalbane, 6th May 1732, p. 84.

—— *Vide* Discharge.

—— OBJECTION.—*Vide* Superior and Vassal.

PERSONAL OBJECTION.—*Vide* Cochran v. Campbell, 31st January 1753, p. 519.

—— A bill of exchange being so framed as to afford a legal objection to its validity, it was found that the acceptor, having been confidential lawyer to the drawer, was barred *personali objectione* from pleading the objection.—Garden v. Rigg, 28th Jan. 1748, p. 409.

PREFERENCE, CROWN'S.—The Crown has no preference over real estate in Scotland for the debts due to it.—Murray v. Thomson, 25th Feb. 1755, p. 594.

POSSESSION.—*Vide* Passive Title and Heir-apparent.

—— (2.) *Vide* Servitude and Prescription.

POWERS OF HEIR OF ENTAIL.—*Vide* Tailzie, No. 17.

—— OF FRUING AND LEASING UNDER AN ENTAIL.—*Vide* Tailzie, No. 24.

PRESCRIPTION, POSITIVE, (1617, c. 12.)—

(1.) Possession during forty years without a title, not sufficient in order to plead the negative prescription.—Magistrates of Perth v. Presbytery of Perth, 6th March 1730, p. 39.

—— (2.) Lands being possessed under a lease, and a feu of the same subsequently granted, it was found that the possession continued to be in virtue of the lease, and that prescription against the right of challenging the feu commenced only at the expiry of the lease, and not from the date of the charter.—Duke of Roxburgh v. Don, 5th March 1734, p. 126.

—— (3.) Of entail. Minority of heir substitute of entail no exception to ditto.—*Vide* Tailzie.

—— (4.) PRESCRIPTION.—*Vide* Servitude.

—— (5.) (COMMONTY).—The proprietor of a moor (over which several heritors had rights of servitude) possessed other lands to which no servitude on the moor belonged, but the tenants of which were in use for above forty years of pasturing cattle, &c., in common with the occupiers of the dominant lands. Found in a process of division of the moor, that the proprietor of the moor, (besides one-fourth *tanquam præcipuum*) was entitled to a share in respect of these other lands.—Trotter v. Earl of Marchmont, &c., 12th Feb. 1736, p. 186.

PRESCRIPTION, POSITIVE (6.) *Vide* Servitude.

— (7.) *Vide* Clause of Return.

— (8.) *Vide* Burgh Royal, No. 3.

OF ADJUDICATION.—*Vide* Adjudication.

— (TRIENNIAL.) — Found that the act 1579 c. 83, establishing the triennial prescription does not apply to actions for the aliment of minors. — *Davidson v. Watson*, 4th Dec. 1740, p. 288.

— Circumstances under which a claim for servant's wages was found to be prescribed. Also found that the term of prescription is to be applied, which is recognised by the law of the debtors' domicile, in opposition to that of the *locus contractus*. — *Robertson v. Marquis of Annandale*, 10th December 1749, p. 293.

— (SEXENNIAL.) — Circumstances in which bills, though they had lain over for twenty-eight years, were not held prescribed. — *Garden v. Rigg*, 28th Jan. 1748, p. 409.

— (VICENNIAL.) — An action being raised after the lapse of nearly forty years, partly on a general claim for money had and received, and partly on a writing importing to be a receipt of money for behoof of another, found that under the circumstances of the case the claim must be presumed to have been extinguished. — *Campbell v. Halket*, 21st April 1749, p. 427.

PRESUMPTION. — Circumstances from which it was held that the payment of a debt had been made by a cautioner, and not by the principal debtor. — *Cutlar v. Maxwell*, 30th March 1731, p. 58.

— Circumstances under which the special terms of a bond of provision, directing it in certain events to devolve to certain substitutes, were found to be limited by a general devolving clause in settlements of other family property subsequently executed. — *Earl of Cassils v. Lord Arch. Hamilton*, 19th and 21st March, 1745, p. 381.

PRESUMPTION.—*Vide* Prescription, No. 2.

— *Vide* Vicennial Prescription.

PRIVILEGE OF PEER. — *Vide* Oath of Party.

PROCESS.—*Vide* *Res judicata*.

PROCESS.—*Vide* *Res judicata*.

— (APPEAL.)—It being objected that the Lord Advocate, who had an interest in the cause, and who had been a party in the Court of Session, was not made a party to the appeal; and that the cause had not been fully determined in the Court of Session, appeal dismissed. — *Magistrates of Montrose v. Don*, 12th May 1738, p. 222.

— *Vide* Patronage.

— The Court of Session having (by an interlocutor not appealed from) refused to make certain persons parties to a depending action, it was found to be incompetent to call them as parties in the House of Lords in an appeal from the final judgment in the action. — *Sir James Cunningham v. Chalmers*, 24th March 1740, p. 267.

— *Vide* Public Police.

— **APPEAL.**—A pursuer having judicially passed from the defender's oath, and an interlocutor being in consequence pronounced circumducing the term, it was found to be incompetent to appeal from previous interlocutors relating to the defender's deponing upon and exhibiting the writings called for. — *Scott v. Lord Napier*, 29th November 1749, p. 441.

— **APPEAL.** — A judgment of the Court of Session refusing to examine the appellant's agent in the cause, being reversed; and it being stated by the respondent, that by another interlocutor (not appealed from) a similar objection to the admissibility of his agent had been sustained; the House of Lords authorized him to present a petition against that interlocutor, although the reclaiming days had then expired. — *Sawyer v. Earl of March and Ruglen*, 2d April 1750, p. 479.

— *Vide* Literary Property.

PROOF.—*Vide* Presumption, No. 1.

— *Vide* Husband and Wife—marriage—its constitution.

— It was found by the Court of Session, that in a clause for bygones, the present rental is the presumptive rule *retro*, except in so far as the heritor can prove a less rental. No judgment upon this point was pronounced in the House of Lords. — *Easton v. Stirling*, 27th Feb. 1733, p. 90.

PROOF.—Circumstances under which parole evidence was allowed to prove the knowledge and consent of the minor.—*Wauchope v. Wauchope*, 14th June 1737, p. 200.

—A proof taken in virtue of a diligence from the Court of Session, in the course of a submission, which came to an end without any decret-arbitral being pronounced, admitted in the particular circumstances of the case, in a subsequent litigation between the parties, the same power of re-examining the witnesses being reserved.—*Sir James Cunningham v. Chalmers*, 24th March 1740, p. 267.

—An instrumentary witness admitted *cum nota* to prove the delivery of the deed, although he was agent in the cause for the party proposing to adduce him.—*Sawyer v. Earl of March*, 2d April 1750, p. 479.

—Defender cited as Haver.—*Vide* Witness.

—Designations of Witnesses to Deed.—*Vide* Witness et Writ.

—Reprobators et Malice.—*Vide* Witness, No. 4.

—Testimony of Physician, when objectionable.—*Vide* Witness, No. 4.

PROVISION TO HEIRS AND CHILDREN.

(1.) The heir under a marriage contract may, during his father's lifetime, renounce for himself and his successors all claims under the contract.—*Moodie v. Stewart*, 6th February 1730, p. 20.

(2.) In a marriage contract, a sum of money being provided to the husband in liferent, and the eldest son of the marriage in fee, and a portion being settled on the daughters, to be paid on their respective marriages,—it was found that the father was obliged to pay the same to the daughters upon becoming due, notwithstanding there would not be left sufficient funds for payment of the provision to the eldest son. It being provided, that, in the event of there being *three* daughters of the marriage, a certain sum should be paid among them according to specified proportions; and there being born *four* daughters,—it was found that the fourth daughter was not entitled to any share of that sum, although no other provision was made

for her.—*Andersons v. Andersons*, 13th March 1734, p. 136.

PROVISION TO HEIRS AND CHILDREN.

(3.) A clause in a marriage-contract provided a certain sum to the children of the marriage in satisfaction of all they could claim except what the father should further provide to them of his own free will,—found that the eldest son, by accepting a disposition of the landed estate from his father, is not deprived of his right to claim his share of this sum, as a child of the marriage.—*Pringle v. Pringle*, 21st Jan. 1741, p. 297.

(4.) Under a clause in an entail, binding the heirs male and tailzie, and provision, to pay a certain sum "to the daughters and heirs female" of the entailer,—the entailer's daughter was found entitled to the provision, although not his heir, a son of his having succeeded to the estate.—*Watson v. Glass, &c.*, 5th Dec. 1744, p. 372.

(5.) *Vide* Tailzie, No. 17.

(6.) *Vide* Fiar, No. 4.

(7.) An entail empowered the next heir to grant provisions to his younger children; but conceiving that the entail so executed was in fraud of his father's marriage contract, which provided the fee of the estate to the heir of the marriage, disposed the estate in fee to his own daughter, and did not exercise the powers conferred, of granting provisions. Held, on reduction of the son's settlement, as in fraud of the entail, that when she was deprived of the benefit of her father's settlement, equity will support that deed to the extent of a reasonable provision, although the powers of the entail in this respect had not been exercised.—*Craik v. Craik*, 25th March 1757, p. 643.

PROFESSOR OF LAW.—It being required by the foundation of a college that the professors of law should be doctors of laws, or, at least, licentiates, *cum rigore examinationis*,—an objection that the college could no longer confer that degree legally, was not sustained against one who pretended to be so qualified.—*Catanach, &c. v. Gordon, &c.*, 11th April 1745, p. 401.

PUBLIC POLICE.—Act 1 Geo. I. c. 5. 1.

Found that, in an action upon the statute it is not necessary to summon the whole inhabitants, but only the magistrates. 2. Found that an action upon the statute is only competent where a building has been "demolished or begun to be demolished," by a mob, with the intention of demolishing it, but not where injury has been done to a house in the prosecution of a different object. 3. Found by the Court of Session, that "no action lies on the statute for damage arising from the carrying off grain, or other goods, out of any house or outhouse, but only for damage done by pulling down such house or outhouse." Reversed in the House of Lords.—Stratton v. Magistrates of Montrose, 19th March 1744, p. 367.

PUBLIC OFFICE.—Office of Chief Usher to the King held to be adjudgable by the creditors of the party who held the appointment, the same being hereditary and patrimonial in its nature.—Sir James Cockburn v. Sir James Cockburn, 21st March 1755, p. 603.

REAL BURDEN.—*Vide* Personal and Real.

RECOGNITION.—*Vide* Superior and Vassal.

REPARATION.—*Vide* Tailzie.

RES JUDICATA.—A party having been prosecuted before the Court of Justiciary on a criminal charge, concluding likewise for damages and expenses, and acquitted, found to be still subject to a civil action.—Gordon v. Gordon, 5th April 1731, p. 60.

—The final sentence of a competent Court in a foreign state, forms a sufficient defence, *exceptions rei judicatae*.—Hamilton v. Dutch East India Company, 4th April 1732, p. 69.

—An extracted judgment of the Court of Session in favour of a pursuer not held to be *res judicata*, on the ground of its having been obtained by collusion on the part of the defender.—Viscount Arbuthnot v. Spotteswood, 22d April 1740, p. 284.

RES JUDICATA.—Circumstances in which points raised *res judicata*.—Craik v. Craik, 21st May 1753, p. 542.

RETOUR OF SERVICE.—*Vide* Service.

RIGHT IN SECURITY.—Circumstances in which the right of reversion in security of the nature of a wadset was found not to have expired by the mere lapse of time, although it had been declared in the agreement that the right of reversion "should cease on the running thereof."—Home v. Home, 23d May 1739, p. 260.

SALMON FISHING.—Gordon v. Earl of Murray, &c., 16th April 1728, p. 8.

—A prior grant to a party of the salmon-fishing in and round an island on a river, without any limitation as to drawing the nets, does not prevent the Crown from making a posterior grant to another party whose lands are opposite; and where the channel is so narrow as not to permit both fishing without encroaching on each other, the parties have an alternate right of fishing.—Lord and Lady Gray v. Magistrates of Perth, 30th March 1757, p. 645.

SASINE.—Found no objection to a sasine that the notary's docket did not mention the particular symbols used in passing infeftment, or bear the notary's motto affixed to his signature, the sasine being eighty years old, and possession having followed upon it.—His Majesty's Advocate v. Urquhart, 6th February 1755, p. 588.

SERVICE OF HEIRS, (Papist.)—A general service as nearest heir Protestant to the husband, found to be a sufficient title to carry the fee settled in the marriage contract, the children of the marriage being Papists, and therefore legally disqualified from succeeding.—Neilson v. Murray, &c., 14th March 1732, p. 65.

—A person being entitled to succeed to lands in virtue of two conveyances, with different destinations, but neither of which imposed or inferred a prohibition to alter, as against him, may, after making up titles upon one of them, exclude, by a gratuitous disposition, the heirs under the other.—Edgar v. Maxwell alias Johnstone, 31st May 1742, p. 334.

—Held that a retour of service bearing that the party was served nearest heir of tailzie in general was good, though it did not mention to

what estate, or by virtue of what deed of tailzie, and carried right to every subject in that character.—*Maitland v. Forbes, (et contra,)* 12th February 1754, p. 570.

SERVITUDE.—Held though the burgh of Kelso as a burgh of barony, and the inhabitants thereof had had immemorial possession of a right of bleaching skins, and of drying and washing linen on the Island of Ana, situated on the river Tweed, and within the appellant's property, that they had not acquired any servitude over it.—*Duke of Roxburgh v. Jeffrey* and others, 18th March, 1757, p. 632.

SETTLEMENT.—*Vide* Provision, No. 6.

SUCCESSION.—*Vide* Minor and Tutor and Curator.

—— *Vide Jus Crediti.*

—— *Vide* Foreign.

—— *Vide* Conquest.

SUBSTITUTE AND CONDITIONAL INSTITUTE.

—A destination of personal property to A. and in case of his decease to B., found to be a proper substitution which subsisted, although the institute survived the testator. Found that this substitution, although alterable by the institute, was not affected by a previous general disposition of all that might belong to him at his death.—*Campbell v. Campbell and husband*, 17th February 1743, p. 343.

SUBSTITUTE HEIR OF ENTAIL.—Minority not deducted in computing prescription.—*Vide* Tailzie.

SUBSTITUTE HEIR OF ENTAIL not affected by attainder of previous heir of entail.—*Vide* Tailzie.

SUPERIOR AND VASSAL.—A vassal having incurred recognition by alienating part of his lands, and the superior upon his subsequent forfeiture having, in his exceptions taken before the Court of Session against the survey made by the trustees, founded his claim solely upon 1 Geo. I. c. 20, and obtained decree, it was found not competent for him thereafter to insist in a declarator of recognition on the ground of the alienation.—*Earl of Sutherland v. Ross, Anderson, &c.*, 25th March 1743, p. 351.

—— Found that vassals who had been in non-entry for upwards of forty years were not liable in the arrears of the retoured duties, it being

uncertain in whom the right to the superiority of the lands was vested during that period.—*Chalmers v. Porter, Alison, &c.*, 9th May 1746, p. 404.

TACK.—In a question between the Crown's kindly tenants of Lochmaben, and the heritable keeper of the Castle, it was found that the tenants, although having neither charter nor sasine, had yet such a right of property in the lands that they could not be removed, and might assign their rights.—*Viscount Stormont v. Henderson, &c.*, 20th April 1732, p. 77.

TACK.—A lease of teinds having been granted to A. and his wife for their lifetime, and to their son for three nineteen years, the entry of the son, as well as of the father and mother, being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foresaid space "next and after baith their deceases,"—found that the tack to the son commenced at the same date with the liferent tack, and not at the expiration of it. A tack of teinds being granted during the currency of an existing tack, with a declaration that the remaining years of the current tack should run after the termination of the new tack,—it was found that this was not an effectual grant of the additional years at the end of the new tack.—*Burnet v. Magistrates of Aberdeen*, 10th March 1741, p. 305.

TAILZIE.—(1.) An heir of entail having made up titles in fee-simple to the entailed estate, and burdened it with debts, contrary to the provision of the entail, which had not been recorded,—his representatives were found liable, at the instance of the next substitute, for reparation and damages, to the effect of disburdening the estate of those debts.—*Duke of Douglas v. Lord Strathnaver*, 25th Feb. 1730, p. 32.

—— (2.) Act 1685 c. 22.—An entail, containing prohibitory and irritant clauses *de non contrahendo debitum*, having been executed before the date of the act 1685, but not followed by infestment until after it, and not recorded in terms of that act,—found not

to debar the heir from granting bonds of provision to his younger children.

— *Borthwick v. Borthwick*, 19th March 1731, p. 53.

TAILZIE. (3.) An heir of entail in possession purchased the *dominium utile* of lands, the superiority of which was included in the entail, and took a resignation *ad remanentiam* in his own hands as superior. Found that the *dominium utile* is not thereby entitled.—*Heron v. Duke of Queensberry and Dover*, 27th April 1733, p. 98.

— (4.) Act 1685 c. 22.—Debt contracted by an heir of entail not infert, but possessing upon a general retour, in which the clauses of the entail against contracting debt were not repeated. Found to be not chargeable against the entailed lands. Found likewise that the same debt was not chargeable on the entailed lands—the entail not having been recorded.—*Denham v. Baillie*, 5th June 1733, p. 113.

— (5.) Circumstances under which a feu charter by an heir of entail was reduced as granted a *non habente potestatem*, although power to feu, without diminution of the rental, was given by the entail.—*Duke of Roxburgh v. Don*, 5th March, 1734, p. 126.

— (6.) A prohibition, with irritant and resolute clauses against charging the estate with debt,—found not to disable from selling.—*Richart v. Earl of Hopetoun*, 5th April 1734, p. 143.

— (7.) An estate was held under a strict entail against contracting debt, or doing any deed whereby it might be evicted, but with power to the heirs to burden it with the entailer's debts. In security of some of these debts, proper wadsets were granted over a part of it, and the heir afterwards executed a bond of eik in favour of the creditor, upon his becoming bound to relieve him of certain other of the debts. It was found that the bond was not *ultra vires* of the heir, and that a decree of apprising proceeding upon it, by which the lands had been carried off, was not struck at by the entail.—*Duke of Roxburgh v. Kerr, &c.*, 18th March 1735, p. 156.

— (8.) (TITLE TO SUE.)—An heir under an entail, which was not pro-

perly recorded, having possessed without inserting in his infeftment the fetters of the entail, and contracted debts; the next heir, (who had made up his titles in the same manner), brought an action to have it declared that these debts were chargeable on the estate, and that he might lawfully sell a part of it in order to pay them. It was found that he had no power to sell,—the right of the creditors to bring proper actions for affecting the estates being reserved.—Honourable Mr Crawford, &c. v. Viscount Garnock, &c., 28th April 1735, p. 167.

TAILZIE (CLAUSE).—(9.) In an entail in favour of a daughter *nominatim*, a clause "prohibiting the heirs female of the said Margaret, her body, or any other of the heirs male and of tailzie above-written (except the heirs male of the said Margaret's body) to sell," &c. Found to debar the daughter from selling.—*Nairn v. Nairn*, 14th May 1736, p. 192.

— (10.) Act 1685 c. 22.—The conditions and irritant clauses not being inserted in a general retour, found not to infer an irritancy.—*Denham v. Stewart*, 17th Feb. 1737, p. 233.

— (11.) Under a substitution "to the heir-female of the body" of the entailer. Found that the daughter of the entailer's eldest son is entitled to succeed in preference to the daughter of the entailer, and to the daughter of a second son, who died last seized in the estate.—*Sir Hew Dalrymple v. Buchan*, 27th March 1739, p. 237.

— (12.) Act 1685 c. 22.—This act, respecting the registration of entails, applies to entails made prior as well as to those made subsequent to its date. The fetters of an unregistered entail not having been inserted in the rights and infeftments of an heir, although referred to generally, are ineffectual against the creditors of the heir.—*Garnock, &c. v. Earl of Glasgow, &c.*, 18th April 1740, p. 281.

— (13.) Act 1685, c. 22.—An entail completed by infeftment, but not recorded in the register of tailzies, is not effectual against the creditors of the heir of entail.—*Mackenzie v. Urquhart, &c.*, 26th Jan. 1741, p. 302.

— (14.) IRITANCY.—Found that

under an entail prohibiting "debts whereby the estate may be adjudged or evicted," the contracting of personal debts, on which no diligence had followed against the estate, does not infer an irritancy. Found that the arrear of an annuity reserved to the entailer's widow, is the debt of the entailer, and not of the heir in possession, although the annuity should have been paid by him. The heirs being prohibited under an irritancy from "contracting debts or doing other deeds of omission or commission whereby the lands, or any part thereof, may be adjudged," &c., and the entailer's widow having led adjudication for the arrears of her annuity,—found that the right of the heir in possession was not thereby irritated.—*Stewart v. Denham*, 8th Ap. 1742, p. 318.

TAILIE (CLAUSE).—(15.) Found that a clause providing "that in case any heir of entail should succeed to a certain other estate, he and the heirs male of his body so succeeding, should be obliged to denude in favour of the next heir," and that the estate in that event should be redeemable "from the said heirs male who shall succeed to both the said estates, and his heir-male foresaid," has not the effect of excluding all the heirs male of the body of the persons so succeeding (so as to make room for the next branch) but only his eldest son, or heir apparent; and the succession opens to the second son.—*Leslie v. Leslie*, 29th April 1742, p. 324.

(CLAUSE).—(16.) Under a clause in an entail binding the heirs male of tailzie and provision to pay a certain sum "to the daughters and heirs female" of the entailer, the entailer's daughter was found entitled to the provision, although not his heir, a son of his having succeeded to the estate.—*Watson v. Glass, &c.*, 5th Dec. 1744, p. 372.

(17.) A power being given to the heir of entail in possession to burden the lands with provisions to younger children, how far these provisions are effectual, upon such heir denuding (in virtue of a clause to that effect) in favour of another heir of entail,—found by the Court of Session that such heir of entail was not

bound to relieve the lands of the burden. Not determined in the House of Lords. Found it not a fair and proper exercise of the power whereby the provision was to be effectual only against the heir of entail on whom the estate devolved, and not on the granter and his heirs.—*Countess of Cassils v. Hamilton*, 19th and 20th March 1745, p. 381.

TAILIE (18.) A prohibition with irritant and resolute clauses against altering the order of succession, or contracting debts, or doing any deed by which the right of succession may be prejudged in any manner of way, is ineffectual to prevent a sale of the estate.—*Davidson v. Sinclair, &c.*, 14th Feb. 1750, p. 459.

(19.) *Vide* Forfeiture. It does not affect the right of the heir substitute of entail after the death of the attainted person and the issue of his body.—*Lord Advocate v. Gordon*, 21st May 1751, p. 508. Et same case *vide* infra.

(FORFEITURE).—(20.) Held that the appellant was not entitled to claim his brother's forfeited estate, he not being an heir substitute, but an heir male of the marriage, under the investitures. And that the deed he founded on, not containing prohibitory, irritant, and resolute clauses, nor recorded, could not support his claim.—*Mercer v. His Majesty's Advocate*, 14th May 1753, p. 538.

(21.) Sequel of No. 19.—Two sons were born in France to a person attainted for high treason, after his attainer; and by judgment of the House of Lords, the estates were forfeited to the Crown during his life and that of his issue. A claim was lodged by a substitute heir of entail after the death of the attainted person, but while his sons were still alive, for possession of the estate, on the ground that, as the attainted person was now dead, and his sons aliens, and so incapable of succeeding, he was entitled to the estate. Held, on a question of law raised by the Judges in England, that, as the sons were aliens, and so incapable of succeeding, the interest of the Crown had determined—reversing the judgment of the Court of Session.—*Gordon v. His Ma-*

jesty's Advocate, 4th February 1754, p. 558.

(22.) An entailed estate was sold by Act of Parliament applied for and obtained with the concurrence of the appellant and others, substitute heirs of entail. Held, (reversing the judgment of the Court of Session) that the appellant was not barred by such concurrence and agreement, nor by the Act of Parliament, from opening up the whole proceedings, and showing that the debts, fraudulently represented as due, were fictitious, and not chargeable against the estate.—MacKenzie v. Stewart, 14th March 1754, p. 578.

(CLAUSE).—(23.) A devolution clause in an entail which contemplated the party favoured possessing the estate disposed, first, and then afterwards succeeding to another estate. Held that the devolution clause was effectual, though the party succeeded to the latter estate first, then afterwards to the estate disposed by the entail.—Sir Alex. Ross v. Lockhart or Ross, 12th February 1756, p. 610.

(24.) (POWERS OF FEUING AND LEASING — INTEREST OF DEBT.)—1. Question, Whether an heir of entail in possession is bound to keep down the interest of the debt on the estate during his possession? 2. Where power was reserved in the entail to grant feus and long tacks? Held that the powers exercised in virtue of this reservation did not fall within the fair and rational administration of the estate, and therefore feus of the greater part of the estate, together with leases of the mansion house and grounds, and sale of growing wood, reduced. — Lord Cathcart &c. v. John Stewart & N. Shaw of Greenock, 19th March 1756, p. 618.

(25.) There being no annulling clause in the entail, held that the debts contracted by a previous heir affected the succeeding heir under the passive titles.—Forbes v. Skene and Dyce, &c., 25th Jan. 1757, p. 628.

TENOR, PROVING THE.—Found the *casus amissionis* must be proved. A charter and sasine proceeding on the procuratory of resignation contained in a bond of tailzie, found not sufficient to prove the tenor of the bond.—Marquis of

Annandale v. Lord Hope, 28th May 1733, p. 108.

TESTING CLAUSE.—*Vide* Witness, No. 3.

TEINDS.—Payment of a certain rate in name of teinds to the minister for forty years without challenge from the titular, found to be a *bona fide* payment *quoad* the whole teinds, and to exoner the heritor of all bygones. Found by the Court of Session that in a claim for bygones the present rental is the presumptive rule *retro*, except in so far as the heritor can prove a less rental. No judgment upon the point was pronounced in the House of Lords.—Easton, &c. v. Stirling, 27th February 1733, p. 90.

A lease of teinds having been granted to A. and his wife for their lifetime, and to their son for three nineteen years, the entry of the son, as well as of the father and mother, being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foresaid space, "next and after baith their deceases,"—found that the tack to the son commenced at the same date with the liferent tack, and not at the expiration of it. A tack of teinds being granted during the currency of an existing tack, with a declaration that the remaining years of the current tack should run after the termination of the new tack—it was found that this was not an effectual grant of the additional years at the end of the new tack.—Burnet v. Magistrates of Aberdeen, 10th March 1741, p. 305.

TITLE TO PURSUE.—A presbytery may pursue in the name of a kirk-session within their bounds, upon a grant made to that kirk-session for charitable uses.—Magistrates of Perth v. Presbytery of Perth, 6th March 1730, p. 39.

—*Vide* Tailzie, No. 8.

—Act 1695 c. 38.—Found that a person having only a right of servitude, is entitled to pursue a division under the act 1695.—Trotter v. Earl of Marchmont, &c., 12th Feb. 1736, p. 186.

—A power of attorney, granted by one who had been judicially declared a lunatic in England was found a sufficient title to pursue in Scotland

for a debt due to him there.—*Bayne v. Earl of Sutherland*, 13th Feb. 1750, p. 455.

TRUST.—A trust for payment of such of the creditors of the grantor's son as the trustees should agree and compound with, and declaring that no action or diligence thereon should be competent to any of the creditors, but, on the contrary, that they should thereby forfeit all interest in the same; and the trustees having for a length of time taken no steps towards a distribution, action was sustained at the instance of the whole creditors, for the purpose of calling the trustees to account for intromissions with the trust estate.—*Duke of Hamilton v. Earl of Haddington, &c.*, 16th Jan. 1760, p. 447.

TUTOR AND CURATOR.—Found that curators or administrators cannot directly alter the minor's or constituent's succession, by taking bonds secluding executors, in lieu of bonds to heirs and executors, without the consent of the minor or constituent. Proof, circumstances under which parole evidence was allowed to prove the knowledge and consent of the minor.—*Wauchope v. Wauchope*, 14th June 1737, p. 200.

WADSET.—*Vide* Right in Security.

—The purchaser having acquired right to a wadset of the lands in consideration of which he had reserved a part of the price,—found that the wadset, though prior in date, did not stand in the way of the claim.—*Sir William Gordon &c. v. Mackenzie*, 6th Feb. 1736, p. 176.

—**PRESCRIPTION OF WADSET.**—*Vide* Adjudication.

—Proper and improper wadset, difference between them in law, and also as a title for voting.—*Stirling v. Campbell*, 2d April 1754, p. 583.

WITNESS.—(1.) Defender cited as a haver for proving a trust. Held not bound to produce the writs specially condescended upon, if he depone that they

contain no clause instructing a trust. But held him not bound to depone or exhibit, except upon a special condescendence of the writs called for. Lawyers and agents cited as havers, are bound to answer only such interrogatories touching writings that have come to their knowledge in the course of their employment, *as might competently be put to their client.*—*Scott v. Lord Napier, &c.* 29th Nov. 1749, p. 441.

—(2.) Instrumentary witness admitted *cum nota* to prove the delivery of the deed, although he was agent in the cause for the party proposing to adduce him.—*Sawyer v. Earl of March and Ruglen*, 2d April 1750, p. 479.

—(3.) A contract as to a right of patronage sustained, though the witnesses' designations to the subscription of one of the contracting parties were not inserted in the body of the deed.—*His Majesty's Advocate v. Urquhart*, 6th Feb. 1755, p. 586.

—(4.) In the reduction of an ante-nuptial contract (which changed the previous investiture by entail of the estate) on the ground of fraud and imbecility; the grantor's wife was offered as a witness for the pursuer, but objected to, on the ground of malice against the appellant (defender). Objection repelled, and proof of reprobatum refused. The physician who attended the grantor, and who was charged with having availed himself of the opportunities which his attendance afforded, to induce the marriage settlement, rejected as a witness in support of the deed.—*Ramsay Irvine v. Irvine*, 10th Dec. 1753, p. 547.

WRIT.—Act 1618 c. 5.—What an insufficient designation of a witness to a bond.—*Carre v. Haldane*, 15th March 1731, p. 51.

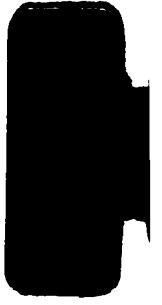
—*Vide* Witness No. 1.

—Circumstances under which deed was not considered a delivered evidant.—*Drummond v. Lord Advocate*, 30th April 1751, p. 503.

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Proof.—Circumstances under which parole evidence was allowed to prove the knowledge and consent of the minor.—*Wauchope v. Wauchope*, 14th June 1737, p. 200.

—A proof taken in virtue of a diligence from the Court of Session, in the course of a submission, which came to an end without any decret-arbitral being pronounced, admitted in the particular circumstances of the case, in a subsequent litigation between the parties, the same power of re-examining the witnesses being reserved.—*Sir James Cunningham v. Chalmers*, 24th March 1740, p. 267.

—An instrumentary witness admitted *cum nota* to prove the delivery of the deed, although he was agent in the cause for the party proposing to adduce him.—*Sawyer v. Earl of March*, 2d April 1750, p. 479.

—Defender cited as Haver.—*Vide* Witness.

—Designations of Witnesses to Deed.—*Vide* Witness et Writ.

—Reprobators et Malice.—*Vide* Witness, No. 4.

—Testimony of Physician, when objectionable.—*Vide* Witness, No. 4.

PROVISION TO HEIRS AND CHILDREN.

(1.) The heir under a marriage contract may, during his father's lifetime, renounce for himself and his successors all claims under the contract.—*Moodie v. Stewart*, 6th February 1730, p. 20.

(2.) In a marriage contract, a sum of money being provided to the husband in liferent, and the eldest son of the marriage in fee, and a portion being settled on the daughters, to be paid on their respective marriages,—it was found that the father was obliged to pay the same to the daughters upon becoming due, notwithstanding there would not be left sufficient funds for payment of the provision to the eldest son. It being provided, that, in the event of there being *three* daughters of the marriage, a certain sum should be paid among them according to specified proportions; and there being born *four* daughters,—it was found that the fourth daughter was not entitled to any share of that sum, although no other provision was made

for her.—*Andersons v. Andersons*, 13th March 1734, p. 136.

PROVISION TO HEIRS AND CHILDREN.

(3.) A clause in a marriage-contract provided a certain sum to the children of the marriage in satisfaction of all they could claim except what the father should further provide to them of his own free will,—found that the eldest son, by accepting a disposition of the landed estate from his father, is not deprived of his right to claim his share of this sum, as a child of the marriage.—*Pringle v. Pringle*, 21st Jan. 1741, p. 297.

(4.) Under a clause in an entail, binding the heirs male and tailzie, and provision, to pay a certain sum "to the daughters and heirs female" of the entailor,—the entailor's daughter was found entitled to the provision, although not his heir, a son of his having succeeded to the estate.—*Watson v. Glass, &c.*, 5th Dec. 1744, p. 372.

(5.) *Vide* Tailzie, No. 17.

(6.) *Vide* Fiar, No. 4.

(7.) An entail empowered the next heir to grant provisions to his younger children; but conceiving that the entail so executed was in fraud of his father's marriage contract, which provided the fee of the estate to the heir of the marriage, disposed the estate in fee to his own daughter, and did not exercise the powers conferred, of granting provisions. Held, on reduction of the son's settlement, as in fraud of the entail, that when she was deprived of the benefit of her father's settlement, equity will support that deed to the extent of a reasonable provision, although the powers of the entail in this respect had not been exercised.—*Craik v. Craik*, 25th March 1757, p. 643.

PROFESSOR OF LAW.—It being required by the foundation of a college that the professors of law should be doctors of laws, or, at least, licentiates, *cum rigore examinationis*,—an objection that the college could no longer confer that degree legally, was not sustained against one who pretended to be so qualified.—*Catanach, &c. v. Gordon, &c.*, 11th April 1745, p. 401.

PUBLIC POLICE.—Act 1 Geo. I. c. 5. 1. Found that, in an action upon the statute it is not necessary to summon the whole inhabitants, but only the magistrates. 2. Found that an action upon the statute is only competent where a building has been “demolished or begun to be demolished,” by a mob, with the intention of demolishing it, but not where injury has been done to a house in the prosecution of a different object. 3. Found by the Court of Session, that “no action lies on the statute for damage arising from the carrying off grain, or other goods, out of any house or outhouse, but only for damage done by pulling down such house or outhouse.” Reversed in the House of Lords.—*Stratton v. Magistrates of Montrose*, 19th March 1744, p. 367.

PUBLIC OFFICE.—Office of Chief Usher to the King held to be adjudgable by the creditors of the party who held the appointment, the same being hereditary and patrimonial in its nature.—*Sir James Cockburn v. Sir James Cockburn*, 21st March 1755, p. 603.

REAL BURDEN.—*Vide* Personal and Real.

RECOGNITION.—*Vide* Superior and Vassal.

REPARATION.—*Vide* Tailzie.

RES JUDICATA.—A party having been prosecuted before the Court of Justiciary on a criminal charge, concluding likewise for damages and expenses, and acquitted, found to be still subject to a civil action.—*Gordon v. Gordon*, 5th April 1731, p. 60.

—The final sentence of a competent Court in a foreign state, forms a sufficient defence, *exceptione rei judicatae*.—*Hamilton v. Dutch East India Company*, 4th April 1732, p. 69.

—An extracted judgment of the Court of Session in favour of a pursuer not held to be *res judicata*, on the ground of its having been obtained by collusion on the part of the defender.—*Viscount Arbutnot v. Spotteswood*, 22d April 1740, p. 284.

RES JUDICATA.—Circumstances in which points raised *res judicata*.—*Craik v. Craik*, 21st May 1753, p. 542.

RETOUR OF SERVICE.—*Vide* Service.

RIGHT IN SECURITY.—Circumstances in which the right of reversion in security of the nature of a wadset was found not to have expired by the mere lapse of time, although it had been declared in the agreement that the right of reversion “should cease on the running thereof.”—*Home v. Home*, 23d May 1739, p. 280.

SALMON FISHING.—*Gordon v. Earl of Murray, &c.*, 16th April 1728, p. 8.

—A prior grant to a party of the salmon-fishing in and round an island on a river, without any limitation as to drawing the nets, does not prevent the Crown from making a posterior grant to another party whose lands are opposite; and where the channel is so narrow as not to permit both fishing without encroaching on each other, the parties have an alternate right of fishing.—*Lord and Lady Gray v. Magistrates of Perth*, 30th March 1757, p. 645.

SASINE.—Found no objection to a sasine that the notary’s docquet did not mention the particular symbols used in passing infeftment, or bear the notary’s motto affixed to his signature, the sasine being eighty years old, and possession having followed upon it.—*His Majesty’s Advocate v. Urquhart*, 6th February 1755, p. 586.

SERVICE OF HEIRS, (Papist.)—A general service as nearest heir Protestant to the husband, found to be a sufficient title to carry the fee settled in the marriage contract, the children of the marriage being Papists, and therefore legally disqualified from succeeding.—*Neilson v. Murray, &c.*, 14th March 1732, p. 65.

—A person being entitled to succeed to lands in virtue of two conveyances, with different destinations, but neither of which imposed or inferred a prohibition to alter, as against him, may, after making up titles upon one of them, exclude, by a gratuitous disposition, the heirs under the other.—*Edgar v. Maxwell alias Johnstone*, 31st May 1742, p. 334.

—Held that a retour of service bearing that the party was served nearest heir of tailzie in general was good, though it did not mention to

what estate, or by virtue of what deed of tailzie, and carried right to every subject in that character. — *Maitland v. Forbes, (et contra,)* 12th February 1754, p. 570.

SERVITUDE.—Held though the burgh of Kelso as a burgh of barony, and the inhabitants thereof had had immemorial possession of a right of bleaching skins, and of drying and washing linen on the Island of Ana, situated on the river Tweed, and within the appellant's property, that they had not acquired any servitude over it.—*Duke of Roxburgh v. Jeffrey and others*, 18th March, 1757, p. 632.

SETTLEMENT.—*Vide Provision*, No. 6.

SUCCESSION.—*Vide Minor and Tutor and Curator.*

—*Vide Jus Crediti.*

—*Vide Foreign.*

—*Vide Conquest.*

SUBSTITUTE AND CONDITIONAL INSTITUTE.

—A destination of personal property to A. and in case of his decease to B., found to be a proper substitution which subsisted, although the institute survived the testator. Found that this substitution, although alterable by the institute, was not affected by a previous general disposition of all that might belong to him at his death.—*Campbell v. Campbell and husband*, 17th February 1743, p. 343.

SUBSTITUTE HEIR OF ENTAIL.—Minority not deducted in computing prescription.—*Vide Tailzie.*

SUBSTITUTE HEIR OF ENTAIL not affected by attainder of previous heir of entail.—*Vide Tailzie.*

SUPERIOR AND VASSAL.—A vassal having incurred recognition by alienating part of his lands, and the superior upon his subsequent forfeiture having, in his exceptions taken before the Court of Session against the survey made by the trustees, founded his claim solely upon 1 Geo. I. c. 20, and obtained decree, it was found not competent for him thereafter to insist in a declarator of recognition on the ground of the alienation.—*Earl of Sutherland v. Ross, Anderson, &c.*, 25th March 1743, p. 351.

—Found that vassals who had been in non-entry for upwards of forty years were not liable in the arrears of the retoured duties, it being

uncertain in whom the right to the superiority of the lands was vested during that period.—*Chalmers v. Porter, Alison, &c.*, 9th May 1746, p. 404.

TACK.—In a question between the Crown's kindly tenants of Lochmaben, and the heritable keeper of the Castle, it was found that the tenants, although having neither charter nor sasine, had yet such a right of property in the lands that they could not be removed, and might assign their rights.—*Viscount Stormont v. Henderson, &c.*, 20th April 1732, p. 77.

TACK.—A lease of teinds having been granted to A. and his wife for their lifetime, and to their son for three nineteen years, the entry of the son, as well as of the father and mother, being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foresaid space "next and after baith their deceases,"—found that the tack to the son commenced at the same date with the liferent tack, and not at the expiration of it. A tack of teinds being granted during the currency of an existing tack, with a declaration that the remaining years of the current tack should run after the termination of the new tack,—it was found that this was not an effectual grant of the additional years at the end of the new tack.—*Burnet v. Magistrates of Aberdeen*, 10th March 1741, p. 305.

TAILZIE.—(1.) An heir of entail having made up titles in fee-simple to the entailed estate, and burdened it with debts, contrary to the provision of the entail, which had not been recorded,—his representatives were found liable, at the instance of the next substitute, for reparation and damages, to the effect of disburdening the estate of those debts.—*Duke of Douglas v. Lord Strathnaver*, 25th Feb. 1730, p. 32.

—(2.) Act 1685 c. 22.—An entail, containing prohibitory and irritant clauses *de non contrahendo debitum*, having been executed before the date of the act 1685, but not followed by infestment until after it, and not recorded in terms of that act,—found not

to debar the heir from granting bonds of provision to his younger children.

— Borthwick v. Borthwick, 19th March 1731, p. 53.

TAILZIE. (3.) An heir of entail in possession purchased the *dominium utile* of lands, the superiority of which was included in the entail, and took a resignation *ad remanentiam* in his own hands as superior. Found that the *dominium utile* is not thereby entitled.—Heron v. Duke of Queensberry and Dover, 27th April 1733, p. 98.

— (4.) Act 1685 c. 22.—Debt contracted by an heir of entail not infert, but possessing upon a general retour, in which the clauses of the entail against contracting debt were not repeated. Found to be not chargeable against the entailed lands. Found likewise that the same debt was not chargeable on the entailed lands—the entail not having been recorded.—Denham v. Baillie, 5th June 1733, p. 113.

— (5.) Circumstances under which a feu charter by an heir of entail was reduced as granted *a non habente potestatem*, although power to feu, without diminution of the rental, was given by the entail.—Duke of Roxburgh v. Don, 5th March, 1734, p. 126.

— (6.) A prohibition, with irritant and resolute clauses against charging the estate with debt,—found not to disable from selling.—Richart v. Earl of Hopetoun, 5th April 1734, p. 143.

— (7.) An estate was held under a strict entail against contracting debt, or doing any deed whereby it might be evicted, but with power to the heirs to burden it with the entailor's debts. In security of some of these debts, proper wadsets were granted over a part of it, and the heir afterwards executed a bond of eik in favour of the creditor, upon his becoming bound to relieve him of certain other of the debts. It was found that the bond was not *ultra vires* of the heir, and that a decree of apprising proceeding upon it, by which the lands had been carried off, was not struck at by the entail.—Duke of Roxburgh v. Kerr, &c., 18th March 1735, p. 156.

— (8.) (TITLE TO SUE.)—An heir under an entail, which was not pro-

perly recorded, having possessed without inserting in his infertment the fetters of the entail, and contracted debts; the next heir, (who had made up his titles in the same manner), brought an action to have it declared that these debts were chargeable on the estate, and that he might lawfully sell a part of it in order to pay them. It was found that he had no power to sell,—the right of the creditors to bring proper actions for affecting the estates being reserved.—Honourable Mr Crawford, &c. v. Viscount Garnock, &c., 28th April 1735, p. 167.

TAILZIE (CLAUSE).—(9.) In an entail in favour of a daughter *nominatim*, a clause "prohibiting the heirs female of the said Margaret, her body, or any other of the heirs male and of tailzie above-written (except the heirs male of the said Margaret's body) to sell," &c. Found to debar the daughter from selling.—Nairn v. Nairn, 14th May 1736, p. 192.

— (10.) Act 1685 c. 22.—The conditions and irritant clauses not being inserted in a general retour, found not to infer an irritancy.—Denham v. Stewart, 17th Feb. 1737, p. 233.

— (11.) Under a substitution "to the heir-female of the body" of the entailor. Found that the daughter of the entailor's eldest son is entitled to succeed in preference to the daughter of the entailor, and to the daughter of a second son, who died last seized in the estate.—Sir Hew Dalrymple v. Buchan, 27th March 1739, p. 237.

— (12.) Act 1685 c. 22.—This act, respecting the registration of entails, applies to entails made prior as well as to those made subsequent to its date. The fetters of an unregistered entail not having been inserted in the rights and infertments of an heir, although referred to generally, are ineffectual against the creditors of the heir.—Garnock, &c. v. Earl of Glasgow, &c., 18th April 1740, p. 281.

— (13.) Act 1685, c. 22.—An entail completed by infertment, but not recorded in the register of tailzies, is not effectual against the creditors of the heir of entail.—Mackenzie v. Urquhart, &c., 26th Jan. 1741, p. 302.

— (14.) IRRITANCY.—Found that

under an entail prohibiting "debts whereby the estate may be adjudged or evicted," the contracting of personal debts, on which no diligence had followed against the estate, does not infer an irritancy. Found that the arrear of an annuity reserved to the entailer's widow, is the debt of the entailer, and not of the heir in possession, although the annuity should have been paid by him. The heirs being prohibited under an irritancy from "contracting debts or doing other deeds of omission or commission whereby the lands, or any part thereof, may be adjudged," &c., and the entailer's widow having led adjudication for the arrears of her annuity,—found that the right of the heir in possession was not thereby irritated.—*Stewart v. Denham*, 8th Ap. 1742, p. 316.

TAILIE (CLAUSE).—(15.) Found that a clause providing "that in case any heir of entail should succeed to a certain other estate, he and the heirs male of his body so succeeding, should be obliged to denude in favour of the next heir," and that the estate in that event should be redeemable "from the said heirs male who shall succeed to both the said estates, and his heir-male foresaid," has not the effect of excluding all the heirs male of the body of the persons so succeeding (so as to make room for the next branch) but only his eldest son, or heir apparent; and the succession opens to the second son.—*Leslie v. Leslie*, 29th April 1742, p. 324.

—(CLAUSE).—(16.) Under a clause in an entail binding the heirs male of tailzie and provision to pay a certain sum "to the daughters and heirs female" of the entailer, the entailer's daughter was found entitled to the provision, although not his heir, a son of his having succeeded to the estate.—*Watson v. Glass, &c.*, 5th Dec. 1744, p. 372.

—(17.) A power being given to the heir of entail in possession to burden the lands with provisions to younger children, how far these provisions are effectual, upon such heir denuding (in virtue of a clause to that effect) in favour of another heir of entail,—found by the Court of Session that such heir of entail was not

bound to relieve the lands of the burden. Not determined in the House of Lords. Found it not a fair and proper exercise of the power whereby the provision was to be effectual only against the heir of entail on whom the estate devolved, and not on the granter and his heirs.—*Countess of Cassils v. Hamilton*, 19th and 20th March 1745, p. 381.

TAILIE (18.) A prohibition with irritant and resolute clauses against altering the order of succession, or contracting debts, or doing any deed by which the right of succession may be prejudged in any manner of way, is ineffectual to prevent a sale of the estate.—*Davidson v. Sinclair, &c.*, 14th Feb. 1750, p. 459.

—(19.) *Vide* Forfeiture. It does not affect the right of the heir substitute of entail after the death of the attainted person and the issue of his body.—*Lord Advocate v. Gordon*, 21st May 1751, p. 506. Et same case *vide* infra.

—(FORFEITURE).—(20.) Held that the appellant was not entitled to claim his brother's forfeited estate, he not being an heir substitute, but an heir male of the marriage, under the investitures. And that the deed he founded on, not containing prohibitory, irritant, and resolute clauses, nor recorded, could not support his claim.—*Mercer v. His Majesty's Advocate*, 14th May 1753, p. 538.

—(21.) Sequel of No. 19.—Two sons were born in France to a person attainted for high treason, after his attainer; and by judgment of the House of Lords, the estates were forfeited to the Crown during his life and that of his issue. A claim was lodged by a substitute heir of entail after the death of the attainted person, but while his sons were still alive, for possession of the estate, on the ground that, as the attainted person was now dead, and his sons aliens, and so incapable of succeeding, he was entitled to the estate. Held, on a question of law raised by the Judges in England, that, as the sons were aliens, and so incapable of succeeding, the interest of the Crown had determined—reversing the judgment of the Court of Session.—*Gordon v. His Ma-*

jefty's Advocate, 4th February 1754, p. 558.

— (22.) An entailed estate was sold by Act of Parliament applied for and obtained with the concurrence of the appellant and others, substitute heirs of entail. Held, (reversing the judgment of the Court of Session) that the appellant was not barred by such concurrence and agreement, nor by the Act of Parliament, from opening up the whole proceedings, and showing that the debts, fraudulently represented as due, were fictitious, and not chargeable against the estate.—*Mackenzie v. Stewart*, 14th March 1754, p. 578.

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— A lease of teinds having been granted to A. and his wife for their lifetime, and to their son for three nineteen years, the entry of the son, as well as of the father and mother, being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foressaid space, "next and after baith their deceases,"—found that the tack to the son commenced at the same date with the liferent tack, and not at the expiration of it. A tack of teinds being granted during the currency of an existing tack, with a declaration that the remaining years of the current tack should run after the termination of the new tack—it was found that this was not an effectual grant of the additional years at the end of the new tack.—*Burnet v. Magistrates of Aberdeen*, 10th March 1741, p. 305.

TITLE TO PURSUE.—A presbytery may pursue in the name of a kirk-session within their bounds, upon a grant made to that kirk-session for charitable uses.—*Magistrates of Perth v. Presbytery of Perth*, 6th March 1730, p. 39.

— *Vide* Tailzie, No. 8.

— Act 1695 c. 38.—Found that a person having only a right of servitude, is entitled to pursue a division under the act 1695.—*Trotter v. Earl of Marchmont, &c.*, 12th Feb. 1736, p. 186.

— A power of attorney, granted by one who had been judicially declared a lunatic in England was found a sufficient title to pursue in Scotland